89-782

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

FREDERICK SMITH, in his individual and official capacity as Principal Bradford Area High School; **RICHARD MILLER**, in his individual and official capacity as assistant principal of the Bradford High School; and **FREDERICK SHUEY**, in his individual and official capacity as Superintendent of the Bradford Area School District

Petitioners

vs

JUDY GROVE SOWERS

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

A. Are school students "at liberty" during summer vacation so that, under the rationale of this Court in *DeShaney v. Winnebago County* there exists no duty under the Fourteenth Amendment for school administrators to protect them from criminal assaults?

B. Was there clearly established law in 1979 that school administrators had a duty under the Fourteenth Amendment to protect school students from criminal assaults?

C. Can this Court's holding in *City of Canton v. Harris* that municipal bodies may be held accountable for a policy amounting to "deliberate indifference" to the rights of citizens be extended to create a new theory of personal liability for municipal officials?

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IV. OPINIONS BELOW

A. Procedural History of This Case

The Judgment Order of the United States Court of Appeals for the Third Circuit on remand (the Order sought to be reviewed) is printed in the Appendix hereto, page 1.

The procedural history of this appeal is as follows: Judy Grove Sowers [hereinafter "Sowers"], sought damages under § 1983 after she claimed that a Bradford Area High School teacher sexually attacked her while she was visiting him in his home during summer vacation. On August 29, 1988, the United States District Court for the Western District of Pennsylvania, at Civil Action No. 88-57 Erie in that Court, denied a Motion to Dismiss submitted by all Defendants; its Opinion is reported at 694 F.Supp. 125 (W.D.Pa. 1988), and is printed in the Appendix hereto at p. 39. Defendants Frederick Smith, Richard Miller and Frederick Shuey [hereinafter "Smith, Miller and Shuey"] appealed that Order to the United States Court of Appeals for the Third Circuit insofar as the District Court had denied their Motion to Dismiss on the basis of qualified immunity. The Court of Appeals affirmed the District Court by Judgment Order dated January 31, 1989, at No. 88-3640 in that Court. That Order is printed in the Appendix hereto at p. 81.

Smith, Miller and Shuey then filed a timely Petition for Writ of Certiorari with this Honorable Court. This

Court granted the petition on April 3, 1989, summarily vacated the Order of the Court of Appeals, and remanded the case for reconsideration in light of this Court's ruling in the case of *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. , 109 S.Ct. 998 (1989). That Order is printed in the Appendix hereto at p. 87 and is reported at 109 S.Ct. 1634.

On remand, the Court of Appeals again affirmed the District Court by Judgment Order dated September 28, 1989. As noted, that Order is printed in the Appendix beginning at page 1. It is this Order which is the subject of the current petition.

B. Related Proceeding

This case is related to the case of *Stoneking v. Bradford Area School District, et al.*, 856 F.2d 594 (3d Cir. 1988), *cert. granted, vacated and remanded sur nom. Smith v. Stoneking* 109 S.Ct. 1333 (1989); *reaffirmed on remand* 882 F.2d 720 (1989). A second petition for writ of certiorari in that case is being filed simultaneously with this petition.

In *Stoneking*, another Bradford Area High School student claimed that she was sexually abused by the same teacher Sowers has accused of abusing her. Stoneking filed suit seeking damages under § 1983, on a legal theory very similar to that advanced by Sowers.

On August 28, 1987, the United States District Court for the Western District of Pennsylvania, at Civil

Action No. 87-63 E in that Court, denied a Motion for Summary Judgment submitted by all Defendants; its Opinion is reported at 667 F.Supp. 1088 (W.D.Pa. 1988), and is printed in the Appendix hereto at p. 91. Smith, Miller and Shuey appealed that Order to the United States Court of Appeals for the Third Circuit insofar as the District Court had denied their Motion for Summary Judgment on the basis of qualified immunity. The Court of Appeals affirmed the District Court by Opinion and Order dated September 12, 1988, at No. 87-3637 in that Court. That Opinion is reported at 856 F.2d 594 (3d Cir. 1988), and is printed in the Appendix hereto at p. 135.

Smith, Miller and Shuey then filed a timely Petition for Writ of Certiorari with this Honorable Court. This Court granted the petition on March 6, 1989, summarily vacated the Order of the Court of Appeals, and remanded the case for reconsideration in light of this Court's ruling in the case of *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. , 109 S.Ct. 998 (1989). That Order is printed in the Appendix hereto at p. 165 and is reported at 109 S.Ct. 1333.

On remand, the Court of Appeals again affirmed the District Court by Opinion and Order dated August 16, 1989. Appendix, p. 169 [hereinafter "*Stoneking II*"]. A Petition for a Writ of Certiorari has been prepared in that case and is intended to be filed simultaneously with this Petition.

V. STATEMENT OF JURISDICTION

Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254.

The Judgment Order of the United States Court of Appeals for the Third Circuit was entered on September 28, 1989. App., page 1.

Jurisdiction for the appeal to the United States Court of Appeals for the Third Circuit was based upon 28 U.S.C. § 1291. The appeal to the United States Court of Appeals for the Third Circuit was made in accord with *Mitchell v. Forsyth*, 472 U.S. 511 (1985), which holds that a denial of a claim of qualified immunity is an appealable final order within the meaning of 28 U.S.C. § 1291.

Jurisdiction of the United States District Court for the Western District of Pennsylvania was invoked by Plaintiff based upon 28 U.S.C. § 1983.

VI. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following are the constitutional provisions and statutes involved in this appeal:

A. Constitutional Provisions

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States under the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment 14, Section 1.

B. Federal Statutes

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof

to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit and equity, or other proper proceeding for regress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983

C. State Statutes

Every teacher, vice principal and principal in the public schools shall have the right to exercise the same authority as to conduct and behavior over the pupils attending his school, during the time they are in attendance, including the time required in going to and from their homes, as the parents, guardians or persons in parental relation to such pupils may exercise over them.

24 Pa.C.S.A. § 13-1317.

VII. STATEMENT OF CASE

The facts material to the consideration of the questions presented are as follows. The Bradford Area School District (the "School District"), which is not a party to this appeal, is a local governmental agency organized pursuant to the laws of the Commonwealth of Pennsylvania. During the relevant period of time, Petitioner Smith was the principal of the Bradford Area High School; Petitioner Miller was the assistant principal; and Petitioner Shuey was the superintendent of the School District.

Respondent Judy Grove Sowers ("Sowers") attended the Bradford Area High School, graduating in 1980.

The record before the District Court and the Court and the Court below reveals the following:

Sowers contends in her Complaint that in June of 1979 the former band director of the Bradford Area High School, Edward Wright, sexually assaulted her. Complaint, par. 12, App. p. 11. Although she omits these material facts from her Complaint, she has testified in a deposition taken in a related case that, during her summer school vacation and after becoming intoxicated at her sister's wedding reception, she visited Wright's private home, where this assault allegedly occurred. App., pp. 34

et seq..[1] This is the only incident of sexual assault of which Sowers complains. No incident occurred while Sowers attended school or a school sponsored activity.

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1 This deposition was originally a part of the record in the related case of *Stoneking* v. *Bradford Area School District, et al.*, 856 F.2d 594 (3d Cir. 1988), *cert. granted, vacated and remanded sur nom. Smith* v. *Stoneking* 109 S.Ct. 1333 (1989); *reaffirmed on remand* 882 F.2d 720 (1989). It was also submitted to and considered by the District Court in this case, which referred to the deposition in its recitation of facts. District Court Opinion, App. at 44. Smith, Miller and Shuey have reproduced the relevant pages of this deposition in the interest of judicial economy since, although Sowers' own Complaint does not recite these facts, her counsel have not attempted to deny this sworn testimony in the prior cases.

VIII. ARGUMENT

A. Summary of Argument

The Court of Appeals in *Stoneking II* failed to explicitly resolve the direct question posed by this Court when it granted certiorari and remanded the case for reconsideration in light of *DeShaney*. By adopting the *Stoneking II* rationale in this case, the practical effect of the Judgment Order is to leave these school officials exposed to trial and possible liability under a theory that they had a duty to protect school students from harm, which duty they allegedly failed to discharge. This *sub silentio* holding is directly contrary to *DeShaney*.

The Court of Appeals acknowledged in *Stoneking II*, however, that there was "uncertainty" in the law regarding the duty to protect. On that basis alone, Smith and Miller should have been granted immunity and dismissed from the suit.

The alternative rationale employed by the Court of Appeals in *Stoneking II*, and adopted by the panel in this case, is also insufficient. The Court extended the rationale of this Court's holding last Term in *City of Canton v. Harris*, 109 S.Ct. 1197 (1989), to create a new theory of individual capacity liability. But the Court does not explain how a failure to properly perform *official* duties results in *personal* liability. The Court's rationale conflicts with this Court's prior holding in *Rizzo v. Goode*, 423 U.S. 362 (1976).

The notion that public officials can be held *personally* liable for acts done within the scope of their official duties is both novel and dangerous, and ought to be reviewed by this Honorable Court.

B. *The Court of Appeals Failed to Resolve the Question Posed by This Court*

When this Honorable Court granted certiorari in this case initially, it vacated the judgment of the Court of Appeals and remanded the case with specific instructions to reconsider its opinion "in light of *DeShaney*". But the Court of Appeals chose to avoid this question, choosing instead to simply adopt the rationale of the panel in *Stoneking II*, which had grounded its decision on a new theory of liability.

The failure of the Court of Appeals to expressly rule on the *DeShaney* issue has the practical effect of denying Smith, Miller and Shuey's claim of qualified immunity with respect to the "duty to protect" theory of liability. In the current posture of the case, the trial court may choose to charge the jury that Smith, Miller and Shuey had a duty under the Fourteenth Amendment to protect Stoneking from the harm which allegedly befell her; the opinion of the Court of Appeals broadly hints that such a charge would be acceptable to it. Thus Smith, Miller and Shuey have for all practical purposes lost their immunity from suit with respect to this theory of liability. This is as effective as an express holding that a duty to

protect exists under the Fourteenth Amendment.

The Court of Appeals in *Stoneking II* did discuss *DeShaney*, strongly suggesting that it would have ruled that its prior ruling was "not inconsistent with the *DeShaney* opinion." Slip Opinion at p. 7, App. p. 177. But the Court refused to make an explicit holding on this basis, "because the uncertainty of the law in this respect may cause further delay."[2] The Court then announced a different theory under which it affirmed its prior ruling.[3]

Smith, Miller and Shuey respectfully suggest to this Court that the response of the Court of Appeals is not sufficient. If the law in this area is uncertain, it is the Court's job to resolve the uncertainty; the doctrine of

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2 This statement would seem to compel a ruling that Smith, Miller, and Shuey are entitled to qualified immunity, because liability cannot attach unless the law regarding a duty to protect was "clearly established" at the time of the incidents of which Stoneking complains. *See* discussion at p. 20, *infra*.

3 The Court of Appeals in *Stoneking II* went on to, in effect, decide a motion for summary judgement on the merits that Smith and Miller were never permitted to argue. That is, is there sufficient evidence in the record from which a jury could conclude that Smith and Miller actually encouraged Wright's misconduct? Smith and Miller, like Judge Stapleton in dissent, strongly believe there is not sufficient evidence to make such a finding, and would have liked the opportunity to present argument on that issue before the Court of Appeals majority issued its ruling *sua sponte*.

qualified immunity requires this.[4]

1. The Court of Appeals' opinion conflicts with Supreme Court precedent

In *DeShaney*, this Court held that the State is under no obligation to protect a person from harm unless the State has so deprived that person of his or her liberty that he or she is unable to protect him or herself. The Court of Appeals on remand in *Stoneking II* claimed that its earlier discussion of "functional custody" is "[a]rguably . . . not inconsistent with the *DeShaney* opinion." Slip opinion, p. 7, App. at 177. The Court implies that Pennsylvania's mandatory school attendance law[5] constitutes a sufficient restraint on liberty to create a duty to protect under the *DeShaney* rationale.

In *DeShaney*, the Supreme Court held that

> when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.

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[4] Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question of whether the conduct of which the plaintiff complains violated clearly established law." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

[5] 24 Pa.C.S.A. §13-1317

[citation and footnote omitted] The rationale for this principle is simple enough: when the State *by affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself*, and at the same time fails to provide for his basic human needs—*e.g.* food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. [citations omitted] *The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.* [citation omitted] In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—*through incarceration, institutionalization, or other similar restraint of personal liberty*—which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

109 S.Ct. at 1005-06 [emphasis supplied].

This language makes it absolutely clear that, in this

case, neither the school district nor its administrators violated any substantive Constitutional right of Sowers. Sowers alleges no facts from which one can reasonably find such a complete deprivation of liberty. Simply put, mandatory public school attendance does not impose affirmative restraints on liberty from which a duty of protection can arise.

It cannot be said that school attendance is a "restraint of liberty" similar to "incarceration" or "institutionalization," contexts where the Courts recognize a duty to protect. Indeed, this Court long ago recognized the significant differences between the school setting and a prison. In *Ingraham v. Wright*, 430 U.S. 651 (1977), the Court held

> [T]he public school remains an open institution. Except perhaps when very young, the child is not physically restrained from leaving school during school hours; and at the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment.
>
> The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner.

Id., 430 U.S. at 670, 97 S.Ct. at 1412.

The panel in this case compounds the error of the *Stoneking II* panel because Judy Grove (now Sowers) was not even in attendance at school at the time of the only alleged assault against her. In her own Complaint she claims that she was attacked in Wright's home during summer vacation. She was not compelled by any state law or directive of the school officials to go to his home that afternoon. Without any doubt whatsoever, she was a person "at liberty" to whom, under this Court's holding in *DeShaney*, these school officials owed no duty of protection. The Court of Appeals' decision to the contrary conflicts directly with *DeShaney*.

2. The Court of Appeals opinion conflicts with rulings in other circuits

The opinion of the Court below in *Stoneking II* also implies openly that school children, when attending school, are analogous to children placed in foster homes who are mistreated by foster parents. Slip opinion at p.8., App. at p. 178. Since the *DeShaney* opinion expressly left open the question of whether liability would exist in that circumstance, *see* 109 S.Ct. at 1006, n. 9, the clear implication is that the Court would find that a duty to protect those foster children exists, and by analogy a duty to protect school children exists. This position, however, has already been rejected by two different Circuits. *See Milburn v. Anne Arundel County Department of Social Services*, 871 F.2d 474 (4th Cir. 1989), *cert. denied* 1989 U.S. LEXIS

4189 (1989) and *Doe v. Bobbitt*, 881 F.2d 510 (7th Cir. 1989).

3. *The Court of Appeals opinion conflicts with other rulings of that Court*

The *sub silentio* holding by the Court of Appeals in *Stoneking II* that school officials have a duty under the substantive component of the due process clause to protect school children is also in conflict with the holding of another panel of that Court. In *Philadelphia Police and Fire Association for Handicapped Children, Inc., et al v. City of Philadelphia*, 874 F.2d 156 (3d Cir. 1989), a unanimous panel of the Court of Appeals held that no such substantive right exists in a closely analogous situation.

In that case, a class comprised of recipients of mental retardation services filed suit to prevent the Commonwealth of Pennsylvania and the City of Philadelphia from reducing the level of services available to them, claiming a violation of equal protection and a substantive due process right to services. The Court analyzed the substantive due process claim in light of *DeShaney*, and concluded that no such rights exist. The Court noted that

> the class contends that because Pennsylvania's statutory scheme requires the mentally retarded to enter the system through the BSU's, where a plan for their care, including a placement determination, is made, the state has custody over those mentally retarded assigned to live at home. Their reli-

> ance on state-provided services, they claim, makes them absolutely dependent upon the state. Similarly, it is asserted that cessation of services will end in literal incarceration. [footnote omitted] *DeShaney*, however, forecloses the class' constructive custody argument because it makes clear that a "state's affirmative act of restraining the individual's freedom to act on his own behalf–through incarceration, institutionalization, or other similar restraint on personal liberty" is a prerequisite to the state's obligation to provide care. *DeShaney*, 57 U.S.L.W. at 4221. . . . Under [*DeShaney*] it is impossible to find an affirmative state duty to protect the mentally retarded living at home.

The Court went on to note that the fact that the class members "participated in state-sponsored day programs" was not sufficient to satisfy *DeShaney's* custody requirement. The Court held that "[i]n light of *DeShaney*, we do not believe that such intermittent custody gives rise to an affirmative duty on the state's part."

The parallels to the case at bar are obvious. In the *Philadelphia Police and Fire Association* case, the state mandated the delivery of services through the base service unit; this is analogous to the mandatory school requirement law relied upon by the *Stoneking II* Court. In the *Philadelphia Police and Fire Association* case attendance at

state-sponsored "day programs," presumably required by the BSU, was seen as only "intermittent custody" which did not give rise to a duty to protect; but the Court of Appeals in *Stoneking II* would apparently find that just such intermittent contact would give rise to such a duty. The Court's opinion in *Stoneking II* is in clear conflict with the unanimous opinion of the panel in *Philadelphia Police and Fire Association*.

C. *Smith, Miller and Shuey Are Entitled to Qualified Immunity*

This appeal, of course, arises in the context of the doctrine of qualified immunity.

The application of qualified immunity is an objective test under *Anderson v. Creighton*, 483 U.S. 635 (1987) and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). As Judge Stapleton correctly phrased the inquiry in his dissenting opinion below, would reasonable school officials with the knowledge allegedly possessed by Smith and Miller have realized in 1980 to 1983 that they were violating a well-established duty owed to Stoneking under federal law?

To begin with, the Court of Appeals' own observation in *Stoneking II* of "the uncertainty of the law in this respect", slip opinion at 8, App. p. 178, proves beyond cavil that there was not, and is not even today, any "well-established duty" or "clearly established law" in this area. In the absence of a violation of clearly established law, an individual defendant is entitled to qualified immunity from

suit. *Mitchell v. Forsyth*, 472 U.S. at 526. On this basis alone, the Court should have recognized that Smith, Miller and Shuey are immune from Sowers' claims, and dismissed the case as to the individual defendants.

But the Court of Appeals in *Stoneking II* did not end its inquiry there. Instead, it went on to hold that there was another "clearly established" duty that Smith and Miller may have violated; that is, a duty not to encourage sexual abuse of students by teachers.

To pose the proper question in terms of qualified immunity, should Smith, Miller and Shuey have realized in 1979 that anything they had done was tantamount to encouragement for Wright to assault female students, and thus violated clearly-established law prohibiting them from giving such encouragement?[6]

It is conceded that Smith and Miller, as reasonable school officials, should have known in that time period that they had a duty not to affirmatively and actively encourage sexual abuse of students. But could they have known that their conduct gave Wright any encouragement? In *Stoneking II*, the only actions of theirs that could possibly have been construed by Wright as encouragement was their handling of the Judy Grove allegations in 1979. But Judy Grove Sowers cannot claim that events subsequent to the

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[6] Smith, Miller and Shuey agree with Judge Stapleton's resolution of that question; the existing record in *Stoneking II* is inadequate "to permit a fact finder to conclude that Wright understood the administration to favor his misdeeds."

alleged assault on her gave Wright encouragement to commit the assault. There is therefore no evidence of any sort that anything Smith, Miller or Shuey did could have given Wright any encouragement to commit the alleged assault on Judy Grove.[7]

Smith, Miller and Shuey are entitled to qualified immunity and to be dismissed from the case entirely; this Court should grant certiorari and dismiss those administrators.

D. The Court of Appeals Has Improperly Applied the Principles of Municipal Liability Under City of Canton *to Individual Defendants*

In its Opinion in *Stoneking II*, the Court of Appeals relied on this Court's decision last term in *City of Canton v. Harris*, 109 S.Ct. 1197 (1989), in which this Court established that, before a municipal body can be held liable for damages under § 1983 on a theory that municipal officers were inadequately trained, the Plaintiff must show that such a failure to train amounts to deliberate indifference to the rights of persons with whom the police come in contact.

At page 10 of its slip opinion, App. at p. 180, the

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7 The Richard DeMarte incidents, discussed in the *Stoneking II* panel opinion at pp. 16-18, App. at pp. 186-188, have no bearing whatsoever on this case, since there is absolutely no evidence or allegation in this voluminous record that Wright was aware of them; thus he could not have drawn any encouragement from those alleged incidents.

Court of Appeals in *Stoneking II* argues that the *City of Canton* case provides an independent basis for liability of appellants Smith and Miller. The Court held that the defendants, "with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused [Stoneking] constitutional harm."[8] It then discussed evidence of how defendants Smith and Miller handled various situations they were faced with. Finally, in its Order disposing of that appeal, the Court dismissed the school superintendent, Frederick Shuey, in his individual capacity only,[9] leaving the principal Frederick Smith and the assistant principal Richard Miller as defendants in their individual capacities.[10]

It appears from the Court's opinion in *Stoneking II*

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8 Smith and Miller respectfully submit that, even on the "evidence" cited by the Court of Appeals in *Stoneking II*, it is impossible to find that they "directly caused" any constitutional harm. The band director Edward Wright caused the direct harm to Stoneking; the most the Court of Appeals could say about Smith and Miller's conduct was that they somehow condoned Wright's behavior by discouraging student complaints. *See* discussion at page 25, *supra*. This is hardly the kind of "direct" cause of harm required by *Rizzo*, *infra*.

9 The Court found no "affirmative acts by Shuey on which Stoneking can base a claim of toleration, condonation or encouragement of sexual harassment by teachers which occurred in one of the various schools within his district", and therefore no basis for liability in his individual capacity. Slip Opinion at p. 24, App. at p. 194.

10 Curiously, the panel in this case did not reverse the district court with respect to Shuey, as the *Stoneking II* panel had done. Thus, Shuey faces the anomoly that, in this case where there is even less of a basis for liability, he remains exposed to liability in his individual capacity as well.

that the conduct of those two school administrators, in the performance of their official duties for the school district, exposes them to personal liability in their individual capacities. Yet the Court give no explanation of any sort as to the source of this *personal* liability.

Since *City of Canton* deals exclusively with municipal liability, its application to a case involving (at this stage) only municipal officials is tenuous at best; at worst, it is an erosion of the principle enunciated in *DeShaney*.

In the *City of Canton* case, Plaintiffs alleged that the City of Canton failed to adequately train its police officers to determine when persons taken into their custody should receive medical attention. The Court held that the City might be liable if the Plaintiff could establish that

> in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy-makers of the city can reasonably be said to have been deliberately indifferent to the need.

Id., 109 S.Ct. at 1205.

While it might be appropriate to impose liability on the policy-making body itself (the City), the application of this principle to the municipal officers who implement the policies is far from clear. It may be that those officers who

can be said to create such policies of indifference might be found liable themselves *in their capacities as policymakers* (*i.e.* in their official capacities). But there is no justification for holding those persons liable in their individual or personal capacities.

In order to determine the capacity in which a person may be found liable, it is necessary to examine the capacity in which he acts when he does the things which allegedly result in liability. If a public official in the performance of his official duties acts in such a way as to directly violate the Constitutional rights of some person, it may be that the public official can be held liable in his official capacity. If the duty to act arises be virtue of one's official responsibilities, official capacity liability may result.

Thus, school administrators may have a duty in their official capacities not to encourage teachers to sexually abuse students. A breach of that duty may result in official capacity liability. But the Court of Appeals in *Stoneking II* held that Smith and Miller might be found liabile in their *individual* capacities if a jury believes they breached that official duty. Yet the Court does not suggest what the source of their duty in their individual or personal capacities might be. Is the Court of Appeals saying that, above and beyond their official duties as school administrators, these men owed some personal duty to Stoneking? Is that simply the "duty to protect" wearing a new disguise?

The most the Court of Appeals could say about the

allegations in *Stoneking II* is that "a jury could reasonably conclude that . . . discouragement of complaints [by Smith and Miller] amounted to a communication of condonation of the teacher's behavior," Slip Opinion at p. ???, App. ???. While the Court believes that such a jury finding would satisfy the "affirmative link" requirement of *Rizzo v. Goode*, 423 U.S. 362 (1976), a closer look at *Rizzo* reveals just the opposite.

In *Rizzo*, a group of citizens filed a class action against the City of Philadelphia police force, seeking injunctive relief under § 1983. The District Court found that none of the respondents in that case had actually participated in the deprivation of the rights of citizens, but found a "pattern" of discouraging citizen complaints and a tendency to "minimize the consequences of police misconduct." *Id.*, 423 U.S. at 368-69. Based upon those findings, the District Court required the City to prepare a set of guidelines to improve the handling of citizen complaints, and entered those new guidelines as an Order of Court. The United States Court of Appeals for the Third Circuit affirmed.

This Court reversed that judgment on several bases, including the lack of a justiciable case or controversy and out of principles of federalism. The Court discussed the merits of the § 1983 claim, however:

> Respondents posit a constitutional "duty" on the part of petitioners (and a corresponding "right" of the citizens of Philadel-

> phia) to "eliminate" future police misconduct; a "default" of that affirmative duty being shown by the statistical pattern, the District Court is empowered to act in petitioners' stead and take whatever preventive measures are necessary, within its discretion, to secure the "right" at issue. Such reasoning, however, blurs accepted usages and meanings in the English language in a way which would be quite inconsistent with the words Congress chose in § 1983. We have never subscribed to these amorphous propositions, and we decline to do so now.

Id., 423 U.S. at 376.

This case is no different than *Rizzo*. To paraphrase this Court, Sowers posits a Constitutional "duty" on the part of Smith, Miller and Shuey (and a corresponding right in herself) to "eliminate" sexual abuse of students by teachers; a "default" of that affirmative duty under her formulation should result in an award of damages under § 1983. Her "evidence" in support of a default of that alleged duty is nothing more than a claim that student complaints (like the citizen complaints in *Rizzo*) were discouraged and minimized. She does not allege that Smith, Miller or Shuey committed any act which directly deprived her of rights (just like the respondents in *Rizzo*).

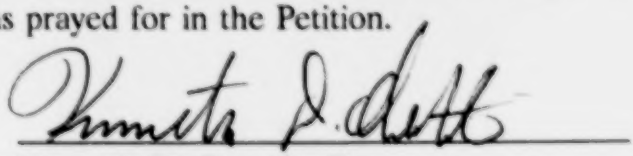
If the facts in *Rizzo* were insufficient to warrant injunctive relief under § 1983, the nearly identical facts of

this case should not be sufficient to warrant an award of damages under § 1983.

The alternative rationale adopted by the Court of Appeals is not sufficient to support a finding of personal liability against Smith, Miller and Shuey in their individual capacities; they all should have been dismissed. This Court should grant certiorari and declare that *City of Canton* cannot be extended to create liability for municipal officers in their individual capacities.

IX. CONCLUSION

WHEREFORE, Petitioners pray that a Writ of Certiorari issue from this Honorable Court to review the judgment of the United States Court of Appeals for the Third Circuit in this action. In the event that the Petition is granted, Petitioners pray that the judgment of the Court below be reversed, that the cause be remanded, and that the Court below be directed to dismiss Petitioners as defendants, as prayed for in the Petition.



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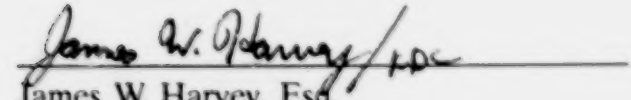

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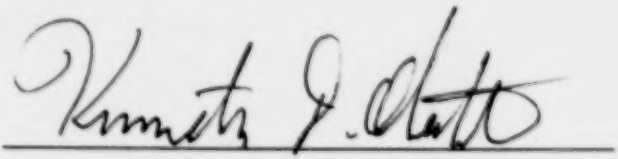
(412) 391-1114
Attorney for Petitioners

X. CERTIFICATION OF MEMBERSHIP

It is hereby certified that both of the Attorneys for the Petitioners are members of the Bar of the Supreme Court of the United States.



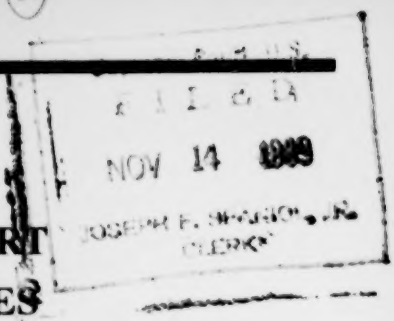
Kenneth D. Chestek, Esq.

XI. PROOF OF SERVICE

I hereby certify that three copies of the within Petition for Writ of Certiorari were served on Wallace J. Knox and Sean J. McLaughlin, Esq., 120 West 10th Street, Erie, PA 16501, this 13 day of November, 1989.

Kenneth D. Chestek, Esq.

89-782



No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

FREDERICK SMITH, in his individual and official capacity as Principal Bradford Area High School; **RICHARD MILLER**, in his individual and official capacity as assistant principal of the Bradford High School; and **FREDERICK SHUEY**, in his individual and official capacity as Superintendent of the Bradford Area School District

Petitioners

vs

JUDY GROVE SOWERS

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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A. Order of U.S. Court of Appeals for Third Circuit, No. 88-3640, September 28, 1989

Sowers v. Bradford Area School District, et al.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3640

JUDY GROVE SOWERS

Appellee

v.

BRADFORD AREA SCHOOL DISTRICT; FREDERICK SMITH, in his individual and official capacity as Principal of the Bradford Area High School; **RICHARD MILLER,** in his individual and official capacity as Assistant Principal of the Bradford Area High School; and **FREDERICK SHUEY,** in his individual and official capacity as Superintendent of the Bradford Area School District,

Frederick Smith, Richard Miller and Frederick Shuey,

Appellants

On Remand from the
Supreme Court of the United States

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 88-00057 E)

Submitted Pursuant to Third Circuit Rule 12 (6)
September 8, 1989

BEFORE: GIBBONS, Chief Judge, and GREENBERG and SEITZ, Circuit Judges

---

JUDGMENT ORDER

The within matter having been remanded to this court by judgment of the Supreme Court of April 3, 1989, for further consideration in light of *DeShaney v. Winnebago County Department of Social Services*, 109 S.Ct. 998 (1989), and our previous judgment having been vacated by the Supreme Court, and we having reconsidered the matter on the basis of the original record and the further briefing by the parties and;

It appearing to the court that despite the less compelling factual circumstances, an affirmance at this stage of the litigation is essentially required by the panel's opinion on remand from the Supreme Court in *Stoneking v. Bradford Area School District*, No. 87-3637, decided August 16, 1989, and see IOP Chapter 8C, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed; and

It is further ORDERED that the matter is remanded to the district court for further proceedings.

Costs taxed against appellants.

BY THE COURT,

/s/ Morton I. Greenberg

ATTEST:

/s/ Sally Mrvos, Clerk

September 28, 1989

B. Complaint, *Sowers v. Bradford Area School District, et al.*, No. 88-57 Erie, February 17, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JUDY GROVE SOWERS,
Plaintiff

vs No. 88-57

BRADFORD AREA SCHOOL DISTRICT; FREDERICK SMITH, in his individual and official capacity as Principal of Bradford Area High School; RICHARD MILLER, in his individual and official capacity as Assistant Principal of Bradford Area High School; and FREDERICK SHUEY, in his individual and official capacity as Superintendent of the Bradford Area School District,
Defendants

COMPLAINT

Parties and Jurisdiction

1. The plaintiff, Judy Grove Sowers (hereinafter "plaintiff"), is a citizen of the Commonwealth of Pennsylvania and resides in Bradford, Pennsylvania.

2. The defendant, Bradford Area School District (hereinafter the "School District"), is a local governmental agency organized pursuant to the laws of the Common-

wealth of Pennsylvania with its principal offices located at 50 Congress Street, Bradford, Pennsylvania.

3. The defendant, Frederick Smith (hereinafter "Smith"), is a citizen of the Commonwealth of Pennsylvania, residing in Bradford, Pennsylvania, who is and was at all material times the Principal of the Bradford Area High School.

4. The defendant, Richard Miller (hereinafter "Miller), is a citizen of the Commonwealth of Pennsylvania, who is and was at all material times the Assistant Principal of the Bradford Area High School.

5. The defendant, Frederick Shuey (hereinafter "Shuey"), is a citizen of the Commonwealth of Pennsylvania, residing in Bradford, Pennsylvania, who was at all material times the Superintendent of the School District.

6. This action arises under Title 42 of the United States Code, §1983 and this court has jurisdiction of this action pursuant to Tile 28 of the United States Code, §§1331 and 1343.

Facts

7. In 1976, the School District hired Edward Wright (hereinafter "Wright") to serve as band director.

8. In his capacity as band director, Wright was vested with broad responsibility for conducting and manag-

ing the band and music programs of the School District, including the selection of student participants, the scheduling and conducting of practice sessions, including a summer camp, and scheduling and conducting band competitions and periodic music rehearsals throughout the school year.

9. At all material times, Wright conducted the aforesaid activities with the knowledge, consent and approval of the defendants.

10. During Wright's tenure as band director, the School District's music program greatly improved and the Bradford Area High School Band won numerous competitions, as a result of which Wright enjoyed the strong support and backing of the School District and its officials.

11. The plaintiff graduated from Bradford Area High School in May of 1980 and was a member of the band during her sophomore, junior and senior years.

12. On or about June 16, 1979, the plaintiff was sexually assaulted by Wright.

13. In or about September of 1979, the plaintiff reported the sexual assault to a visiting youth counselor, Gene Dillard, who was lecturing in the School District at the request of the Administration.

14. Subsequent to that conversation, Dillard, personally met with defendants Smith and Miller and a

Guidance Counselor whose identity is presently unknown and advised them of the reports of sexual abuse and harassment by Wright and further advised that he considered the reports to be accurate.

15. At or about the same time, and periodically thereafter during the fall and early winter of the school year 1979-1980, the plaintiff met with defendants Smith and Miller and personally informed them of the sexual assault by Wright.

16. During these meetings with the plaintiff, defendants Smith and Miller actively discouraged the plaintiff from pursuing her remedies in court against Wright through intimidation, threats and coercion, and further indicated to the plaintiff for reasons unknown to her at the time, that they did not believe her.

17. In or about January of 1980, defendant Smith required the plaintiff, as a condition of her continued participation in the band, to appear before the assembled high school band for the purpose of issuing a public apology for having accused Wright of the sexual assault.

18. At the band meeting, the defendant Smith opened the floor to questions from plaintiff's fellow students, but the plaintiff did not issue an apology and left the band room in an extremely emotional state.

19. Defendant Shuey was on actual notice of plaintiff's allegation of sexual molestation by Wright and was also aware of and condoned the administrative response thereto.

20. Prior to his employment in the Bradford School District, Wright had attempted to sexually molest and/or harass various female students while employed as the band director in the Jasper School District.

21. During his tenure in the Bradford School District, Wright had sexually abused and/or harassed other female students in the District both prior and subsequent to assaulting plaintiff.

22. The defendants were on actual or constructive notice that Wright posed a significant threat to the health, safety and welfare of the female student body at Bradford High School in general and the plaintiff in particular prior to June 16, 1979.

Count I
Judy Grove Sowers v. Bradford Area School District

23. Paragraphs 1 through 22 are incorporated herein by reference as if fully set forth.

24. There existed in the Bradford School District a widespread practice, custom and/or policy with the knowledge and acquiescence of administrative personnel, includ-

ing Smith, Miller, Shuey and the Bradford School Board, of reckless indifference to and/or active concealment of instances of known or suspected sexual abuse of students by teachers.

25. This pernicious practice, custom and/or policy existed prior and subsequent to the assault by Wright of the plaintiff. However, its existence was unknown and unknowable to the plaintiff at the time.

26. In support of the above averment, the plaintiff pleads with particularly the following: (Only the initials of the victims of the sexual abuse and/or harassment are set forth below. The full names of the victims involved will be divulged to the court, in camera, if desired.)

(a) During the school year of 1977-78, a female senior at the Bradford High School, T.R., complained to defendants Smith and Miller that a history teacher and girls' tennis coach, Richard DeMarte, had made improper sexual advances toward her in a classroom. No disciplinary action was taken against DeMarte and the student was told by the defendants not to tell her parents of the incident.;

(b) In or about 1978, and periodically thereafter, defendants Smith, Miller and Shuey received complaints of sexually abusive language and/or improper sexual advances by a Shop Teacher,

George Brady. No disciplinary action taken against Mr. Brady and the administrative response was to place a sign on Brady's shop door prohibiting students from congregating there;

(c) As set forth more fully above, the defendants were advised by the plaintiff and Dillard of Wright's sexual molestation of the plaintiff in June of 1979 and had been on notice prior thereto of Wright's proclivity with respect to female students;

(d) On or about January 12, 1981, defendants Smith and Miller were informed by a second female student of Bradford High School, L.T., that Richard DeMarte had kissed her on the neck several times in a classroom. No disciplinary action was taken against DeMarte and the Administration's response was to remove the student from DeMarte's class and issue to him a "no one-on-one" directive;

(e) On or about March 10, 1981, another female student of the Bradford High School, L.L., reported to Smith and Miller that Richard DeMarte had blindfolded her in a classroom, ostensibly to demonstrate the sense of touch, and she observed him on his hand and knees looking up her dress. No disciplinary action was taken against DeMarte and Smith actively intimidated the student from

pursuing further action in stating that it was "DeMarte's word against hers" and "Mr. Miller and he would have to judge from that." Another "no one-on-one" directive was issued to DeMarte;

(f) In or about March of 1982, two female students complained to the defendants that Mr. Brady had written sexually suggestive notes and further had asked female students to come into his shop room alone after school. No disciplinary action was taken against Brady;

(g) On or about November 23, 1982, yet a fourth female student at the High School, K.L., complained to defendants Smith and Miller that Richard DeMarte had touched her inappropriately and was attempting to develop a romantic relationship. No disciplinary action was taken against DeMarte;

(h) Commencing in or about June of 1984 and continuing through approximately November of 1984, the defendants were advised by numerous sources, including the parents of A.P., a female basketball player in the High School, that her male coach, Alex Nuzzo, was attempting to develop a romantic relationship with her. Despite numerous complaints, no disciplinary action was taken and Nuzzo was simply issued a written "no one-on-one directive" by defendant Smith with the

knowledge and consent of Miller, Shuey and the School Board precluding him from being along with female students;

(i) In or about late September or early October of 1984, a female band member, K.R., informed a guidance counselor that Wright had attempted to sexually molest her in a vehicle. In addition, this student informed the counselor that Wright was presently molesting another student and had molested a student who graduated. This information was relayed to defendant Smith and ultimately defendant Shuey;

(j) On or about December 15, 1984, defendant Smith met with Wright and issued another no one-on-one directive, but informed Wright that "no one had accused him of any wrongdoing;"

(k) In or about October of 1985, the defendants were informed that Richard DeMarte had attempted to sexually assault R.H., a former Bradford High School student, while attending a homecoming celebration. No disciplinary action was taken against DeMarte;

(l) In or about March of 1986, three female Bradford High School students, M.P., J.M., and A.F., complained to defendants that the girls swimming coach had made improper sexual

comments. No disciplinary action was taken against Bell;

(m) In or about March of 1986, Wright resigned after public disclosure of his sexual abuse of students but a private psychologist rather than the School District contacted the police an the Child Hot Line..

27. The recklessly indifferent custom, practice and/or policy of the School District consisted of the following:

(a) Failing to report pursuant to the requirements of the Child Protective Services Law, 11 P.S. §2201 et seq., various incidents of suspected abuse or harassment of female students by Bradford Area High School teachers;

(b) Permitting various teachers to remain in charge of extracurricular student activities, such as the band and girls tennis team, despite knowledge that said teachers presented a danger to the health, safety and welfare of the participants thereof;

(c) Failing to censor, reprimand or take any disciplinary action against various teachers, including Wright, who the defendants knew posed a

threat to the health, safety and welfare of the female student population;

(d) Actively concealing reports of sexual abuse of students by teachers and discouraging the victims from pursuing their remedies in court through threats, intimidation and coercion;

(e) Failing to require the monitoring of various teachers' activities despite actual knowledge that they posed a threat to the female population of the Bradford Area School District;

(f) Consistently giving the various teachers set forth above the maximum possible score of their yearly rating forms despite actual knowledge that said teachers had been sexually abusing and/or harassing female students over a several year period;

(g) Failing to adopt, implement and/or follow a proper policy or procedure to insure the identification and reporting of sexual abuse of students by teachers.

28. At all material times, a special custodial relationship existed between the plaintiff as a student and the defendants as administrative personnel of the School District.

29. At all material times, each of the defendants acted under color of state law.

30. The recklessly indifferent custom, practice and/or policy of the School District as set forth above created a climate wherein child abusers, such as Wright, could prey upon female students with impunity.

31. As a proximate result of the aforesaid custom, practice and/or policy of the School District, the plaintiff was deprived of her rights, privileges and immunities secured by the Constitution or Laws of the United States, specifically her liberty interest to be free in her person from sexual abuse guaranteed under the Fourteenth Amendment and her rights under the First and Fourteenth Amendments of free access to the courts impeded by threats, coercion or intimidation.

32. As a further proximate result of the custom, practice and/or policy of the School District, the plaintiff has suffered and will continue to suffer in the future from severe mental anguish, embarrassment, humiliation and emotional distress.

WHEREFORE, the plaintiff, Judy Grove Sowers, requests compensatory damages against the defendant, Bradford School District, in an amount in excess of $10,000.00, plus costs of suit and attorney's fees pursuant to Title 42, U.S.C. §1988.

Count II

(Conspiracy to Violate Plaintiff's Civil Rights Under §1983)

Judy Grove Sowers v. Frederick Smith, Richard Miller and Frederick Shuey

33. The averments in paragraphs 1 through 32 are incorporated herein by reference as if sully set forth.

34. At all material times both prior and subsequent to the assault by Wright of the plaintiff, the individual defendants were members of a conspiracy whose purpose was to conceal from public instances of known and/or suspected sexual abuse of students by various teachers in the Bradford School District, including Wright.

35. This conspiracy was unknown and unknowable to the plaintiff at the time.

36. The overt acts in furtherance of said conspiracy included the individual defendants' consistent failure to respond appropriately to the various complaints of sexual abuse or harassment by teachers, including Wright, as set forth more fully above and in particular the recklessly indifferent fashion in which the defendants addressed the complaints of the plaintiff against Wright during the school year 1979-80.

37. As further evidence of said conspiracy, defendant Smith maintained a personal, secret file in his

desk drawer at home memorializing many of the complaints concerning the teachers set forth more fully above and also the explicit or tacit agreement of each of the co-conspirators to the reckless, willful and wanton administrative response to each complaint.

38. As a proximate result of the aforesaid conspiracy between the individual defendants, the plaintiff was deprived of her rights, privileges and immunities secured by the Constitution or Laws of the United States, specifically her liberty interest to be free in her person from sexual abuse guaranteed under the Fourteenth Amendment and her rights under the First and Fourteenth Amendment of free access to the courts impeded by threats, coercion or intimidation.

39. As a further proximate result of the custom, practice and/or policy of the School District, the plaintiff has suffered and will continue to suffer in the future from severe mental anguish, embarrassment, humiliation and emotional distress.

WHEREFORE, the plaintiff, Judy Grove Sowers, request compensatory damages against the defendants, Frederick Smith, Richard Miller and Frederick Shuey, in an amount in excess of $10,000.00, plus punitive damages, costs of suit and attorney's fee pursuant to Title 42, U.S.C. §1988.

JURY TRIAL

DEMANDED

Respectfully submitted,

KNOX GRAHAM MCLAUGHLIN
GORNALL AND SENNETT,
INC.

BY: /s/ Wallace J. Knox

/s/Sean J. McLaughlin
Attorneys for Plaintiff
Judy Grove Sowers
120 West Tenth Street
Erie, PA 16501
(814) 459-2800

C. Motion to Dismiss, *Sowers v. Bradford Area School District, et al.*, No. 88-57 Erie, April 12, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JUDY GROVE SOWERS,
Plaintiff

vs C.A. No. 88-57

BRADFORD AREA SCHOOL DISTRICT; FREDERICK SMITH, in his individual and official capacity as Principal of Bradford Area High School; RICHARD MILLER, in his individual and official capacity as Assistant Principal of Bradford Area High School; and FREDERICK SHUEY, in his individual and official capacity as Superintendent of the Bradford Area School District,

Defendants

MOTION TO DISMISS AND/OR STRIKE

NOW COME DEFENDANTS, by and through their attorneys MURPHY, TAYLOR AND ADAMS, P.C. and ISRAEL AND WOOD and move to dismiss the within Complaint or, in the alternative, strike portions thereof, setting forth as follows:

I. Motion to Dismiss Pursuant to F.R.Civ.P. 12 (b) (6)

1. The Complaint fails to state a claim upon which relief can be granted, for the following reasons:

a. It appears from the face of the Complaint that Plaintiff's injury occurred on June 16, 1979, and no plausible excuse has been pleaded as to why Plaintiff did not bring her action within the limitations period allowed for actions such as these; accordingly, the claim is barred by the statute of limitations.

b. The Defendants were under no duty to protect this Plaintiff from the injury which allegedly occurred to her at the hands of a school teacher.

c. The individual defendants are immune from this action.

d. No action of any Defendant was the "moving force" behind this alleged injury; the Bradford Area School District is therefore not liable.

e. Count Two does not set forth any allegation of illegal conduct by any Defendant.

f. Any state law claims which might be inferred from the allegations of this Complaint are barred by the Pennsylvania Political Subdivision Tort Claims Act.

II. Motion to Strike Pursuant to F.R.Civ.P. 12 (f)

2. Paragraphs 25 and 26 of the Complaint contain immaterial, impertinent and scandalous matters, consisting of allegations of conduct involving teachers other than Ed Wright, students other than Plaintiff, and conduct subsequent to the alleged injury to Plaintiff, all of which has no bearing in any way on the alleged injury to this Plaintiff.

3. Paragraph 20 alleges conduct of Ed Wright which pre-dates his employment with the Defendant Bradford Area School District, but fails to allege that the District ever knew about the said conduct. It is thus immaterial to any cause of action.

Respectfully Submitted,

MURPHY, TAYLOR AND ADAMS, P.C.

By:_____

Kenneth D. Chestek, Esq.
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(814) 459-0234

ISRAEL AND WOOD

By:_____

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D. Excerpts of Transcript of Judy Grove Sowers deposition - September 12, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

KIM HARBAUGH and LISA ROVITO, Plaintiffs	)	
v.	)	Civil Action
BRADFORD AREA SCHOOL DISTRICT, FREDERICK SMITH, In his individual and official capacity as principal of Bradford Area High School; and FREDERICK SHUEY, in his individual and official capacity as Superintendent of Bradford Area School District, Defendants	)	No. 86-132 Erie No. 86-133

* * * * * * * * * * *

Depositions of Judy Grove Sowers, Colleen McDonald Begin, Kathy Rodgers and Kathy Stoneking taken at the offices of Quinn, Gent, Buseck and Leemhuis, Inc., 1400 G. Daniel Baldwin Building, Erie, Pennsylvania on Friday, September 12, 1986 beginning at 9:00 a.m. before Mary F. Hines, court reporter.

Appeared on behalf of the Plaintiffs:

Sean J. McLaughlin, Esquire

Appeared on behalf of the Defendants:

James D. McDonald, Jr., Esquire and

Kenneth D. Chestek, Esquire

describing what happened. We do need to know the facts.

MR. McLAUGHLIN: Judy, you'll have to--I agree with Mr. McDonald, you have an obligation to testify, so do the best you can.

Q. Let me ask you some preliminary questions. You've indicated that the first incident occurred, or an incident occurred on June 16, 1979. You've indicated that this was after the conclusion of school, is that right? After school let out for the year?

A. Yes.

Q. Where did the incident occur?

A. At his house.

Q. All right, and where was his house at that time?

A. North Center Street.

Q. Was there anyone else there that you know of other than you and he?

A. No.

Q. Do you remember what day of the week June 16th was?

A. Saturday.

Q. Do you remember what time of the day you arrived at his house?

A. No.

Q. Do you remember whether it was morning, afternoon or evening?

A. Afternoon.

Q. Do you remember where you had been prior to coming to his house, going to his house?

A. My sister's wedding.

Q. Had he attended the wedding, as well?

A. No.

Q. Whose idea was it for you to go to his house? Yours or his?

A. Mine.

Q. Okay, what was the purpose of going to his home?

A. To pick up a tape of our marching music. I was section leader and I was to learn the music.

Q. Was there any prearrangement that you would pick it up, not necessarily that day, but at any time?

A. No, I was going away the next day fairly early for two weeks, and the day I came back was the day band practice was supposed to start.

Q. How do you know this was June 16, 1979?

A. Because that's the day my sister married.

Q. You relate it to the wedding date, so you're solid on at least the day that it occurred?

A. Yes.

Q. Had you participated in the wedding reception before going?

A. Yes.

Q. Had you been drinking?

A. Yes.

Q. Okay. My only purpose in asking that is to find out how well you recall what went on after that. What, in the best of your recollection, happened from the time you went to the door until the time you left there?

A. I know he was preparing a tape, preparing to tape a tape. It was my understanding it was already made. So I sat down and the only thing I remember was waking up and he was more or less--.

Q. Let me ask some other questions for a moment, Judy. Did you tell him why you were there?

A. He knew, yes.

Q. How did he know?

A. I called him before I left. He knew I was coming.

Q. Before you left the wedding reception?

A. My house.

Q. Would that have been before or after the wedding reception?

A. After the wedding reception.

Q. Had you advised him that you wanted to pick up a tape?

A. Yes.

Q. You said that you sat down because he was

working on a tape, or while he was working on a tape?

A. He said he'd have to tape it, so I sat down and he proceeded to tape the album of our music.

Q. Did he have a device that permitted him to duplicate the tape?

A. Yes.

Q. What did you sit on? A chair, couch?

A. Couch.

Q. Would this have been in any particular room that you recall?

A. Living room.

Q. Did you fall asleep?

A. I believe I passed out, yes.

Q. You just didn't--to your best recollection was it from too much to drink?

A. Yes.

Q. What do you recall after you woke up, or the time that you woke up?

A. He was just all over me.

Q. Were you still on the couch?

A. Yes.

Q. In what position?

A. I suppose I was lying down.

Q. Were you still clothed?

A. Yes.

E. Opinion and Order, U.S. District for Western District of Pennsylvania, No. 88-57 E., August 29, 1988, reported at 694 F.Supp. 125

Sowers v. Bradford Area School District, et al.

JUDY GROVE SOWERS,

Plaintiff,

v.

BRADFORD AREA SCHOOL DISTRICT; FREDERICK SMITH, in his individual and official capacity as Principal of the Bradford Area High School; **RICHARD MILLER,** in his individual and official capacity as Assistant Principal of the Bradford Area High School; and **FREDERICK SHUEY,** in his individual and official capacity as Superintendent of the Bradford Area School District,

Defendants

Civil Action No. 88-57 Erie

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

694 F. Supp. 125; 1988 U.S. Dist. LEXIS 9613

August 29, 1988

GLEN E. MENCER, UNITED STATES DISTRICT JUDGE

OPINION

This is a civil rights action brought under 42 U.S.C. § 1983 [§ 1983] by a former Bradford high school student,

Judy Grove Sowers, against the Bradford Area School District ["school district"], the school district's superintendent, Frederick Shuey, and the high school's principal and assistant principal, Frederick Smith and Richard Miller. This is the third suit filed against these same defendants by former female students. This case centers on a June 16, 1979 sexual assault upon the plaintiff, then a high school student and member of the marching band by the band director, Edward Wright.

Count I of the complaint is against the school district and alleges that there existed a pernicious practice, custom and/or policy, prior and subsequent to the assault by Wright, of reckless indifference to and/or active concealment of instances of known or suspected sexual abuse of students by teachers. It further alleges that this created a climate wherein child abusers, such as Wright, could prey upon female students with impunity. The complaint alleges that the School District's conduct was a proximate cause of a deprivation of the plaintiff's constitutional rights to freedom from sexual abuse and free access to the courts unimpeded by threats, coercion or intimidation, as well as severe mental anguish, embarrassment, humiliation and emotional distress.

Count II alleges that the individual defendants were members of a conspiracy whose purpose was to conceal from the public instances of known and/or suspected sexual abuse of students by various teachers. The alleged overt acts in furtherance of the conspiracy included, *inter alia*,

the alleged co-conspirators' failure to respond appropriately to the complaints of sexual abuse and defendant Smith's keeping of a personal, secret file in his desk drawer at home memorializing many of the complaints against teachers, as well as the explicit or tacit agreement of each of the alleged co-conspirators The alleged proximate results of the conspiracy are the same as those under Count I.

FACTS

At the heart of this suit is the allegation that on June 16, 1979, Sowers,[1] a member of the school marching band, was sexually molested by Edward Wright, the band director.[2] Wright had been hired by the school district in 1976, with responsibility to supervise band activities and provide music lessons to students. Prior to 1976, Wright had been the band director in the Jasper School District, where the complaint alleges he "had attempted to sexually molest and/or harass various female students." Complaint at par. 20. The complaint alleges that the defendants had been on notice of Wright's proclivities with respect to female students prior to the June, 1979 assault, although the complaint does not detail how it was that they had been put on such notice. Complaint at par. 26(c).

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[1] At the time of the assault, the plaintiff's name was Judy Grove. This action is brought under the name Sowers, the plaintiff's married name. We will refer to her by that name as well.

[2] On November 6, 1986, Edward Wright plead guilty to a ten count criminal indictment which included four counts of indecent assault.

Sower's complaint asserts that Wright's assault on her was just one in a series of incidents in which the defendants, although informed by female students of sexual abuse by teachers, took no action except to conceal the problem. The complaint alleges that prior to the June 16, 1979 assault, during the 1977-78 school year, a female senior informed defendants Smith and Miller that a history teacher (and coach of the girls' tennis team) had made improper sexual advances toward her in a classroom. Complaint at par. 26(a). Smith and Miller told her not to tell her parents about the incident, and no disciplinary action was pursued against the faculty member. *Id.* In 1978 and periodically thereafter, Smith, Miller and school district superintendent Shuey were alleged to have received other complaints of sexually abusive language and/or improper sexual advances by a shop teacher. Complaint at par. 26(b). The defendants allegedly pursued no disciplinary action against the shop teacher. *Id.*

Edward Wright's sexual assault on Judy Grove Sower's occurred on June 16, 1979. According to her deposition, she went to Wright's house to obtain a tape of marching music. Sowers was a section leader and had to learn the music for summer band practice. She was going away the next day for two weeks, therefore she had to obtain the tape so she could learn the music prior to the commencement of summer band practice. Sowers Deposition at 16. She reported the assault to Gene Dillard, a youth counselor visiting the school at the invitation of the school administration. Complaint at par. 13. Dillard

informed Smith and Miller, as well as a school guidance counselor, of the sexual abuse and harassment by Wright. He told them he considered her reports to be truthful. *Id.* at par. 14. Soon thereafter, Sowers met with Smith and Miller and personally informed them of the sexual assault by Wright. Other meetings were held during the fall and early winter between Sowers, Smith and Miller. *Id.* at par. 15. The plaintiff alleges that Smith and Miller actively discouraged her from pursuing her remedies in court against Wright "through intimidation, threats and coercion," and indicated that they did not believe her. *Id.* at par. 16. In January 1980, Smith told Sowers that if she wanted to remain in the school marching band she would have to publicly apologize for having accused Wright of the sexual assault. *Id.* at par. 17. When Smith had assembled the band members, Sowers did not apologize, instead leaving the band room "in an extremely emotional state." *Id.* at par. 18.

The plaintiff's complaint goes on to list numerous instances where female students reported subsequent episodes of sexual abuse by Wright and other male teachers at the Bradford high school to the defendants. *Id.* at pars. 26(d) - (1). In none of these cases did the defendants pursue disciplinary action against the molesting male teachers beyond issuing an occasional "no one-on-one" directive. For example, in late September or early of 1984, a female band member told her guidance counselor that Wright had attempted to sexually molest her in a vehicle. *Id.* at par. 26(i). This student also told the counselor that Wright was currently molesting another student and had

molested yet another student who had graduated. *Id.* The accusation was relayed to defendants Smith and Shuey. On December 15, 1984, Smith met with Wright and issued another "no one-on-one" directive, but informed Wright that no one accused him of any wrongdoing." *Id.* at par. 26(j). The plaintiff also alleges that Smith maintained a personal, secret file in his desk drawer at home, memorializing many of the complaints. *Id.* at par. 37. The school administration's alleged toleration of Wright's abuse of female students came to an end in March of 1986 when fresh allegations brought about meetings between school administrators and parents of children who had been assaulted by Wright. Wright was suspended as of March 10, 1986, and later resigned.

DISCUSSION

I. Defendants' Motion to Strike Portions of the Complaint

The defendants' move to strike portions of paragraphs 25 and 26 of the complaint, as well as all of paragraph 20. They assert that paragraphs 25 and 26 "contain immaterial, impertinent and scandalous matters, consisting of allegations of conduct involving teachers other than Plaintiff, students other than Plaintiff, and conduct subsequent to the alleged injury to Plaintiff, all of which has no bearing in any way on the alleged injury to this Plaintiff." Defendants Motion to Dismiss and/or Strike, p. 2. Paragraph 25 mentions no teachers or students at all, thus we

do not understand the defendants' reason for striking it, and we will not do so. Paragraph 26 indeed refers to teachers other than Wright, and students other than the plaintiff (albeit these students are referred to by initials, not by name). Because the plaintiff's case depends upon establishing a policy or custom which was adhered to in response to numerous allegations of child abuse by various teachers at the school district, such allegations are relevant to her case. While we agree with the defendants that the conduct described in these allegations could be viewed as scandalous, we do not agree that they are immaterial or impertinent, and we will deny their motion to strike.

II. Defendants' Motion to Dismiss the Complaint

The defendants offer a number of grounds for dismissal of the Sowers complaint against them, allegations the defendants scorn as "impertinent"[3] Defendants' Brief in Support at 2; *see also* Defendants' Motion to Dismiss and/or Strike, p. 2. Defendants argue that the complaint fails to state a claim under § 1983 and that the action is barred by the two-year statute of limitations.

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[3] It is unclear whether the defendants intend the word "impertinent" in the sense of "presumptuous, rude, uncivil," or "not pertinent, irrelevant." *See Random House Collegiate Dictionary*, revised ed. 1980, p. 667. If true, the plaintiff's allegations are anything but impertinent, in either sense of the word.

In order to properly decide the motion to dismiss, it is necessary to analyze the required elements of a cause of action under § 1983, as well as the questions surrounding the limitations period. An analysis of the most salient issues begins with the question of whether the plaintiff's complaint alleges a deprivation of a constitutional right "under color of law. In cases such as this where a plaintiff alleges that the defendants' policy or custom resulted in the failure to carry out an alleged duty to protect the plaintiff, a court must find a "special relationship" between the plaintiff and the state body or official creating a duty to protect. In addition, where a claim is based upon a failure to act by the defendants, a court must consider whether that failure to act: (I) was a substantial factor leading to a violation of a constitutionally protected liberty or property interest; and (2) displayed "deliberate indifference" or "gross negligence" with regard to that violation.

A. Standard for Deciding a Motion to Dismiss

A motion to dismiss tests the formal sufficiency of the statement of the claim for relief, addressing itself solely to the failure of the complaint to state a claim for relief. Wright & Miller, *Federal Practice And Procedure* § 1356 (1987 Supp.). To merit dismissal, the plaintiff's pleading must fail to meet the liberal requirements for pleading a claim set forth in Rule 8(a), which calls for "a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.*; Fed. R. Civ. P. 8(b). For purposes of the motion to dismiss, the complaint is construed in the

light most favorable to the plaintiff and its allegations taken as true. *Id.* at § 1357. In general, a court has broad discretion in ruling on a motion to dismiss, but dismissal should only be granted with care in order to avoid improperly denying plaintiff the opportunity to have her claim adjudicated on the merits. *Id.* "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support his claims." *Estate of Bailey By Oare v. County of York*, 768 F.2d 503 (3d Cir. 1985) (*quoting Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974)).

B. Deprivation of a Constitutional Right "Under Color of State Law"

To state a claim under § 1983 an individual must allege facts constituting a deprivation of a constitutional right under color of state law. An official's actions are not removed from under color of state law merely because the official acted beyond the scope of the authority granted by state law. Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is taken "under color of" state law. *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941); *Doe "A" v. Special School Dist. of St. Louis Co.*, 637 F. Supp. 1138, 1142 (E.D. Mo. 1986); *accord Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). The plaintiff's complaint alleges that there existed a practice, custom and/or policy which

caused the deprivation of her constitutional rights. "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611, 638 (1978); *see also Estate of Bailey by Oare v. County of York*, 768 F.2d 503, 506 (3d Cir. 1985). "In an appropriate case, even in the absence of formal agency conduct, an 'official policy' may be inferred 'from informal acts or omissions of supervisory municipal officials.'" *Estate of Bailey by Oare*, 768 F.2d at 506 (*quoting Turpin v. Mailet*, 619 F.2d 196, 200 (2d Cir.), *cert. denied*, 449 U.S. 1016, 101 S.Ct. 577, 66 L.Ed.2d 475 (1980)). By these standards, we believe the complaint sufficiently alleges that the defendants caused a deprivation of her constitutional rights "under color of state law."[4]

C. Special Relationship

In § 1983 actions such as this one where a plaintiff asserts a right of protection, courts require that there exist a "special relationship" between the plaintiff and defendant which would create a duty to protect. *See Jensen v. Conrad*, 747 F.2d 185, 194-95 (4th Cir. 1984), *cert. denied*, 470

[4] Public officials are liable under § 1983 if the official *causes* an individual to be deprived of a constitutional right. *Baker v. McCollon*, 443 U.S. 137, 142, 99 S.Ct. 2689, 2693, 61 L.Ed.2d 433, 440 (1979).

U.S. 1052, 105 S.Ct. 1754, 84 L.Ed.2d 818 (1985). In *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982), the Seventh Circuit refused to hold the state liable for a murder committed by a schizophrenic (with a history of criminal violence) one year after being released from a state mental hospital. Judge Posner stated "there is no constitutional right to be protected by the state against being murdered by criminals or madmen." *Bowers*, 686 F.2d at 618. Judge Posner, a jurist renowned as a theorist in tort law, acknowledged that where the state is responsible for placing a person in a position of danger or potential harm, the state would owe an affirmative duty obligating the state to protect that person. Judge Posner wrote:

> If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tort feasor as if it had thrown him into a snake pit. It is on this theory that state prison personnel are sometimes held liable under section 1983 for the violence of one prison inmate against another.

Bowers, 818 F.2d at 618. The Fourth Circuit later noted that the Bowers finding that the general public has no constitutional right to protection, and the state no duty to protect, from criminals and madmen, was expressly qualified by its acknowledgment that "such a right and corollary duty may arise out of *special custodial or other*

relationships created or assumed by the state in respect of particular persons." *Fox v. Custis*, 712 F.2d 84, 88 (4th Cir. 1983) [emphasis added]. Courts have found the "special relationship" requirement, the nexus between a plaintiff and the state necessary to an action under § 1983, to be a standard that is elusive and difficult to define.

Estate of Bailey by Oare v. County of York involved a county children's services agency's involvement in the tragic abuse and death of a five-year-old girl. 768 F.2d 503 (3d Cir. 1985). The girl lived with her mother and her mother's boyfriend when relatives noticed severe bruises and other evidence of abuse on the child's body. When the relatives contacted the police and the child services agency, the agency had the girl examined by a physician. The physician advised that the boyfriend be denied access to the child, and that the girl should be taken from the mother if necessary to deny the boyfriend access. The next day the county agency returned the child to the mother's custody, undertaking no independent investigation to determine what access the boyfriend might have. A month later the girl died from physical injuries inflicted on her by the boyfriend and mother. *Id.* 768 F.2d at 505. The Third Circuit found there to be a "special relationship" between the little girl and the childrens services agency and the county, noting that the plaintiff alleged that the defendants had evidence of previous abuse, was aware of the source of abuse and inadequately investigated the danger. The circuit court therefore vacated and remanded the district court's granting of the defendants' motion to dismiss. *Id.*

at 510. "When the agency knows that a child has been beaten, '[t]his strengthens the argument that some sort of special relationship has been established.'" *Id.* at 510-11 (*quoting Jensen v. Conrad*, 747 F.2d 185, 195 n. 11 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052, 105 S.Ct. 1754, 84 L.Ed.2d 818 (1985) (suggests special relationship where state agency failed to intervene to prevent beatings of children by their guardians)).

The Third Circuit's "special relationship" analysis in *Estate of Bailey by Oare* highlighted two cases as examples of instances where a "duty of protection has been found owing by the state and local entities to persons who were not in custody." *Id.* at 510. The first was *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979), in which the Seventh Circuit reversed the dismissal of a complaint alleging that police who had arrested the driver of a car subjected the three passenger children to a health-endangering situation by abandoning them. That court had reasoned that "the police could not avoid knowing that, absent their assistance, the three children would be subjected to cold weather and danger from traffic. This indifference in the face of known dangers certainly must constitute gross negligence." *Id.*, 592 F.2d at 385. The second example given was *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984), which involved an allegation local police systematically failed to adequately protect women abused or assaulted by a spouse or boy friend. The *Thurman* court stated, "City officials and police officers are under an affirmative duty to preserve law and order, and to protect

the personal safety of persons in the community." *Id.*, 595 F. Supp. at 1527. This duty was held to require officials having notice of the possibility of attacks on women in domestic relationships "to take reasonable measures to protect the personal safety of such persons in the community." *Id.*

There is a significant, although not dispositive, distinction between the facts of *Estate of Bailey by Oare, White* and *Thurman* on the one hand, and the present case. In those cases, the plaintiff toward whom a special relationship and duty existed had been individuals whose specific need for state protection were identifiable prior to their injury. In the present case the vulnerability to sexual abuse due to the defendants' customs, practices and/or policies was shared by all the female students at the high school. Even if the plaintiff's allegation that the defendants had prior notice of Wright's propensity for sexual abuse is taken as true, the potentially endangered group would include, at the least, all females belonging to the marching band.[5]

A number of cases have found a "special relationship" to exist when an identifiable group, rather than a specific individual, was endangered. In *P.L.C. v. Housing Authority of County of Warren*, a tenant in a public housing project brought a civil rights action after she was raped

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[5] The Court has no information regarding the number of females in the Bradford marching band at that time.

by a county housing authority employee who entered her apartment using a housing authority key. 588 F. Supp. 961 (W.D. Pa. 1984). Her complaint alleged that the housing authority knew or should have known of the assailant's prior convictions for rape and his alcoholism when they hired him as a maintenance man. *Id.*, 588 F. Supp. at 962. In *P.L.C.*, as in the case at bar, the danger posed by the housing authority's conduct (or lack thereof) was shared by the plaintiff as a member of an identifiable group of potential victims, i.e., the female residents of the housing project. Judge Weber found "that the authority and its officials stood inn a special relationship to this particular plaintiff." *Id.*, 588 F. Supp. at 965.[6]

Similarly, in *Beck v. Kansas Univ. Psychiatry Foundation*, 580 F. Supp. 527 (D. Kansas 1984), two individuals were shot to death at the University of Kansas Medical Center emergency room by a released prisoner with a known propensity for violence against the medical center, its staff, patients and visitors. *Id.*, 580 F. Supp. at 531. Denying a motion to dismiss by the defendant Kansas Adult Authority, the state agency which released the assail-

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[6] *Compare Wright v. City of Ozark*, 715 F.2d 1513 (11th Cir. 1983), in which a woman raped by an unknown assailant brought a § 1983 action against the city, the mayor, the police chief and a member of the police department alleging that the defendants had deliberately suppressed information of prior rapes in a certain area of the city to avoid adverse publicity. The Eleventh Circuit found there to be no "special relationship" because the defendants had not intentionally singled her out to be denied protection from a rapist and there was no al legation that the defendants knew of the plaintiff before the rape occurred.

ant despite knowledge of his potential for violence at the medical center, the court found that the Adult Authority had a duty to take into account "the best interests of society." The court concluded that "[c]ertainly that duty includes taking into account the special danger which the inmate may have to an identifiable group or individual." *Id.*, 580 F. Supp. at 534. Thus, a special relationship was found between the state authority and an identifiable group, namely the staff, patients and visitors of the medical center. Thus, the *Beck* court concluded that the plaintiffs' complaint alleged a "special relationship" between the Kansas Adult Authority and the plaintiffs.

In the present case, the question is whether the defendants were in a "special relationship" with the endangered "identifiable group," female students (or band members) at the Bradford high school. We find that the defendants owed a duty to protect its students from sexual abuse by its teachers. We think this duty is at least as clear as those owed to the tenants in *P.L.C.*, the abused women in *Thurman*, or the visitors to the medical center in *Beck*. The people and the legislature of Pennsylvania trust their children to the care and supervision of school officials, and grant those officials in loco parentis authority over those children while they attend school.[7] In addition, school

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[7] The Pennsylvania Public School Code states that:

> Every teacher, vice principal and principal in the public schools shall have the right to exercise the same authority as to conduct and behavior over the pupils attending his school,

districts are statutorily authorized to fire teachers for "immorality," which has been held to include uninvited advances by teachers toward students. 24 P.S. § 11-1122; *see Keating v. Bd. of School Directors of Riverside School District*, 513 A.2d 547, 99 Pa.Cmwlth. 337 (1986), *app. denied*, 522 A.2d 51, 514 Pa. 626 (1987). As we stated in *Stoneking v. Bradford Area School District*, "abuse of this type is not tolerated when the victim is a prison inmate or a patient in a state hospital. Clearly then, the constitution must offer school children similar protections." 667 F. Supp. at 1095 [citations omitted]. We find that a "special relationship," with an accompanying duty to protect, exists between a student and her school district, school district superintendent, principal and vice principal.

The defendants raise the factual distinction that this assault took place off school grounds at the teacher's home, at the beginning of summer vacation. The defendants argue that "in no sense of the word could any 'special relationship' exist at the time of this alleged assault." Defendants' Brief in Support, p. 17 n. 7. Under the facts of this case, we do not agree. The increased threat to female students created by the defendants' alleged tolerance for sexual abuse was not the sort of danger that

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during the time they are in attendance, including the time required in going to and from their homes, as the parents, guardians or persons in parental relation to such pupils may exercise over them.

24 P.S. § 13-1317 (1988 P.P.).

disappeared when those students packed up their instruments and walked out of the band room. Because Wright conducted marching band practices during the summer months, his opportunity to abuse his female band students, opportunity he possessed by virtue of his position as a teacher and director of the band, did not disappear when the school bell sounded the end of day or the beginning of vacation-time. Presumably it would have made little difference if the maintenance man in *P.L.C. v. Housing Authority of the County of Warren* had been off-duty, or on vacation, when he used his housing authority key to enter the rape victim's apartment. Similarly, it is irrelevant to this Court in determining the existence of a "special relationship," whether Sowers was assaulted while she was picking up a marching band tape for band practice to be held during the school year or during the summer months. The timing and circumstances of the assault may or may not be relevant to the factual determination of causation of Sowers' injury, but, as we will discuss later in this decision, the question of proximate cause requires factual development and is therefore inappropriate to decide on a motion to dismiss.

D. Requirements for Liability Under § 1983 For A Failure To Act

The defendants are alleged to have fostered a practice, custom and/or policy of reckless indifference and/or active concealment of instances of known or suspected

sexual abuse. The complaint alleges that this practice, custom and/or policy was the result of both overt activity and failures to act on the part of the defendants. Government officials may be held liable under § 1983 for a failure to do what is required as well as for overt activity which is unlawful and harmful. *See Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); *Doe v. New York City Dept. of Social Services*, 649 F.2d 134, 141 (2d Cir. 1981) [Doe I]; *Duchesne v. Sugarman*, 566 F.2d 817, 822 (2d Cir. 1977) ("where conduct of the supervisory authority is directly related to a denial of a constitutional right, it is not to be distinguished as a matter of causation, upon "whether it was action or inaction"). For a § 1983 cause of action to arise where an official is charged with failing to exercise an affirmative duty, the failure to act must have been a substantial factor leading to the violation of a *constitutionally protected liberty or property interest*. *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976). The official having the responsibility to act must also have displayed "*deliberate indifference*" or "*gross negligence*." *Turpin v. Mailet*, 619 F.2d 196 (2d Cir.), *cert. denied sub nom. Turpin v. West Haven*, 449 U.S. 1016, 101 S.Ct. 577, 66 L.Ed.2d 475 (1980) ("deliberate indifference" standard); *Doe v. New York City Dept. of Social Services*, 709 F.2d 782, 789-790 (2d Cir. 1983) [Doe II], *cert. denied sub nom. Catholic Home Bureau v. Doe*, 464 U.S. 864, 104 S.Ct. 196, 78 L.Ed.2d 171 (1983) ("gross negligence" standard) (*citing Youngberg v. Romeo*, 457 U.S. 307, ___, 102 S.Ct. 2452, 2462, 73 L.Ed.2d 28 (1982)). As our reasoning below will explain, we believe that these two re-

quirements, an alleged violation of a protected liberty interest and an alleged display of "deliberate indifference" or "gross negligence," are met in the plaintiff's complaint.

1. Violation of a Liberty Interest: Substantive Due Process

The first of the two requirements for a § 1983 claim for a failure to act is that the failure to act must have been a *substantial factor* leading to the violation of a constitutionally protected liberty or property interest. As to whether the plaintiff has alleged that the defendants' failures to act amounted to a substantial factor leading to the constitutional violation, we believe the complaint does so allege. Furthermore, as we will explain later in the statute of limitations section of this opinion, the question of causation is not amenable to determination on the basis of pleadings alone. We will therefore move on to the question of whether the plaintiff has properly alleged a constitutionally protected liberty interest.

The liberty interest which the plaintiff alleges was deprived her was a substantive due process right to be free from sexual abuse. Substantive due process rights are significantly different from procedural due process rights. Procedural due process involves expectations created by state law. As to these rights, the state may take them away by affording pre-deprivation hearings, post-deprivation hearings or other safeguards. Substantive due process, on the other hand, is concerned with rights such as those

listed in the Bill of Rights and those rights held to be so fundamental that a state may not take them away regardless of the fairness of the procedures used to do so. *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 663, 88 L.Ed.2d 662, 668 (1986). Justice Frankfurter noted that the scope of due process protection is not subject to precise definition:

> Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are so rooted in the traditions and conscience of our people as to be ranked as fundamental, *Snyder v. Massachusetts*, 291 U.S. 97, 105 [54 S.Ct. 330, 332, 78 L.Ed.2d 674], or are implicit in the concept of ordered liberty. *Palko v. Connecticut*, 302 U.S. 319, 325 [58 S.Ct. 149, 152, 82 L.Ed.2d 288].

Rochin v. California, 342 U.S. 165, 169, 72 S.Ct. 205, 208, 96 L.Ed.2d 183 (1952). Due process "is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints." *Poe v. Ullman*, 367 U.S. 497, 543, 81 S.Ct. 1752, 1777, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting). "The content of substantive due process must be determined in each case through disinterested inquiry and by judgment not ad hoc and episodic but duly mindful of reconciling the needs of both continuity and of change in a progressive society." *Doe "A" v. Special School District of St. Louis*

County, 637 F. Supp. 1138, 1144 (E.D. Mo. 1986) (*citing Rochin v. California*, 342 U.S. at 172, 72 S.Ct. at 209.)

Courts have recognized that substantive due process includes the right to be free from state intrusions into personal privacy and bodily security.[8] Illustrative of the substantive due process rights of students is a recent Missouri case, *Doe "A" v. Special School District of St. Louis Co.*, 637 F. Supp. 1138 (E.D. Mo. 1986). That action concerned nine handicapped children who had repeatedly been beaten and sexually abused over the course of a year and a half by a school bus driver while they were passengers aboard his bus. Claims were brought under § 1983

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[8] *See, e.g., Ingraham v. Wright*, 430 U.S. 651, 673-74, 97 S.Ct. 1401, ___, 51 L.Ed.2d 711, 731-732 (1977) (corporal punishment of students by teachers, substantive due process right to personal security); *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) (forcible use of stomach pump by police); *Taylor By And Through Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (foster child suit against state and county officials for injuries received in custody of foster parents); *Davis v. Forrest*, 768 F.2d 257, 258 (8th Cir. 1985) (two police officers' unnecessary beating plaintiff with flashlights); *Doe v. New York City Dept. of Social Services*, 649 F.2d 134, 141-145 (2d Cir. 1981) (municipality liable under § 1983 for deliberate indifference to sexual abuse of foster child by foster parent); *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980) (severe corporal punishment inflicted upon grade school student by teacher violated student's substantive due process rights); *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) (police arrest driver of car, abandoning three passenger children); *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied* 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973) (unprovoked beating of pretrial detainee by guards); *Jenkins v. Averitt*, 424 F.2d 1228, 1231-32 (4th Cir. 1970) (reckless pistol shooting of suspect by police); *Doe "A" v. Special School District of St. Louis County*, 637 F. Supp. 1138 (E.D. Mo. 1986) (handicapped children beaten and sexually abused by school bus driver); *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984) (police with notice of possibility of attacks on women in domestic relationships).

against the bus driver, the school district and twelve individual school administrators. *Id.* at 1141. Despite receiving complaints from parents, teachers and other school employees, it was alleged that the school district and school administrators: (1) failed to investigate the complaints; (2) concealed the bus driver's actions by discouraging investigation; (3) failed to develop a policy to provide training for the investigation of complaints and to screen employees for their propensity to abuse children; (4) failed to report the bus driver's conduct to law enforcement and child protective agencies despite their statutory obligations to do so. *Id.* at 1142.

When the defendants in *Doe "A"* moved to dismiss the § 1983 claims for failure to allege conduct arising under color of state law and failure to allege actions which rise to the level of constitutional violations, the district court denied the motions. The court first found that the bus driver, as a school district employee, acted under color of state law. *Id.* at 1143. After examining the legal development of substantive due process rights, the court stated that "this Court does not doubt that the constitutional rights of children to be free from harm is commensurate with the rights of adults in state custody." *Id.* at 1145. The court concluded that:

> The acts of abuse alleged by plaintiffs state a substantive due process claim. The acts intrude upon the personal privacy and bodily integrity of these children. The acts intrude in ways

> more personal and private than a jailhouse beating and in ways which will surely leave psychological scars long after physical healing is complete. . . . The alleged acts of [the bus driver] and the alleged tolerance of these acts by [the school district] and the individual defendants pass beyond the pale of common law torts. They shock the conscience of this Court.

Doe "A", 637 F. Supp. at 1145.

In *Hall v. Tawney*, a case involving the infliction of severe corporal punishment on grade school students, the Fourth Circuit explained the substantive due process right at issue as:

> the right to be free of state intrusions into the realms of personal privacy and bodily security through means so brutal, demeaning, and harmful as literally to shock the conscience of a court. The existence of this right to ultimate bodily security - the most fundamental aspect of personal privacy - is unmistakably established in our constitutional decisions as an attribute of the ordered liberty that is the concern of substantive due process. Numerous cases in a variety of contexts recognize it as a last line of defense against those literally outrageous abuses of official power whose very

> variety makes formulation of a more precise standard impossible.

Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980) (citations omitted). The court explained that it "simply do not see how" it could fail to uphold the right in "public school children under the disciplinary control of public school teachers" when the right was upheld in persons charged with or suspected of crime and in the custody of police officers. *Id.*

We think it apparent that the plaintiff's complaint alleges a deprivation of Sowers' right to be free from state intrusions, in this case by her teacher, into her personal privacy and bodily security. Because such a right is embraced within the scope of substantive due process, this satisfies the requirement that her complaint allege a violation of a constitutionally protected liberty interest.

2. <u>"Deliberate Indifference" or "Gross Negligence" by Defendants</u>

The second requirement for a § 1983 claim for a failure to act is that the official having the responsibility to act must display "deliberate indifference" or "gross negligence." The question is whether this requirement is met by the plaintiff's al legation of "reckless indifference" by the defendants. Traditionally the term gross negligence" has been held equivalent to the words "reckless and wanton,"

see, e.g., Jones v. Commonwealth, 213 Ky. 356, 281 S.W. 164, 167 (1926), and the Supreme Court in *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), has characterized deliberate indifference as "the wanton infliction of unnecessary pain." 429 U.S. at 105, 97 S.Ct. at 291. Furthermore, in *Estate of Bailey by Oare*, the Third Circuit described the burden of proof on the plaintiffs in that § 1983 action as "[permitting] the fact finder to infer deliberate or *reckless indifference* or unconcern or callous disregard for" the deceased plaintiff's safety. *Estate of Bailey by Oare*, 768 F.2d 503, 508 (3d Cir. 1985) [emphasis added]; *see also Commonwealth Bank & Trust Co., N.A. v. Russell*, 825 F.2d 12, 17 (3d Cir. 1987). We therefore conclude that the plaintiff's allegation of "reckless indifference" properly states a claim against the defendants under § 1983.

Because the plaintiff's complaint properly alleges a claim under § 1983, we will deny the defendants' motion to dismiss the complaint for failure to state a claim.

III. Statute of Limitations and Discovery Rule for Tolling

In *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), the Supreme Court ruled that the statute of limitations for § 1983 actions is the statute of limitations for the relevant state's personal injury statute. Since this § 1983 action arose within the Commonwealth, we must apply the two-year statute of limitations set forth in 42 Pa.C.S.A. § 5524(2). *See Sullivan v. City of Pittsburgh*

Pa., 811 F.2d 171 (3d Cir.), *cert. denied*, 56 U.S.L.W. 3244, 108 S.Ct. 148, 98 L.Ed.2d 104 (1987); *Stoneking v. Bradford Area School District*, 667 F. Supp. 1088, 1091 (W.D. Pa. 1987).

Federal courts have recognized a "discovery rule" for setting the date from which the two-year statute of limitation would begin to run. Courts distinguish between the date when a cause of action accrues and the tolling of a statute of limitations.[9] State law governs the tolling of the statute, unless state law is inconsistent with the purposes behind the civil rights acts. *Board of Regents v. Tomanio*, 446 U.S. 478, 484-86, 100 S.Ct. 1790, 1795-96, 64 L.Ed.2d 440 (1980) (§ 1983 claim).[10] The accrual of a civil rights action, however, is a question of federal law. *Dreary v. Three Un-named Police Officers*, 746 F.2d 185, 197 n. 16 (3d Cir. 1984); *Sandutch v. Muroski*, 684 F.2d 252, 254 (3d Cir. 1982) (per curium) (*citing Cox v. Stanton*, 529 F.2d 47, 50 (4th Cir. 1975)); *Plain v. Flicker*, 645 F. Supp. 898, 901 (D. N.J. 1986) (claims under 42 U.S.C. §§ 1983, 1985). We consider the accrual of the cause of action to be the

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[9] A cause of action "accrues" when a suit may be maintained thereon, whenever one person may sue another. Black's Law Dictionary (rev. 4th ed., 1968) p. 37. The tolling of a statute of limitations essentially "stops the clock" with regard to the limitation. This includes the delay of the initial running of the limitations period, interruption of the running of the limitations period, or timely filing of the action within the statutory limitations period.

[10] *See also Wilson v. Garcia*, 471 U.S. 261, 269 & n. 17, 105 S.Ct. 1938, ___ & n. 17, 85 L.Ed.2d 254, 262 & n. 17; *Johnson v. Railway Express Agency, Inc.*, 421, U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975).

threshold statute of limitations issue because any state tolling doctrine would not come into play until the cause of action had accrued. Under federal law, a § 1983 claim accrues when the plaintiff knows or has reason to know of the injury that constitutes the basis of her action. *Id.* Federal courts have fashioned a "discovery rule" which requires that a cause of action accrues when the plaintiff becomes aware, or should have become aware, of both the fact of injury and its causal connection to the defendant, although the plaintiff need not know that the defendant's conduct is tortious or unlawful.[11] *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979) (discovery rule under Federal Tort Claims Act); *see also Plain v. Flicker*, 645 F. Supp. 898, 901 (D. N.J. 1986) (applying *Kubrick* rule to § 1983 action); *Hauptmann v. Wilentz*, 570 F. Supp. 351, 396 (D. N.J. 1983), *aff'd* 770 F.2d 1070 (3d Cir.), *cert. denied* 474 U.S. 1103, 106 S.Ct.

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[11] As this Court noted in *Stoneking v. Bradford Area School District*, 667 F. Supp. 1088 (W.D. Pa. 1987), Pennsylvania courts have also recognized a "discovery rule" exception to its statute of limitations. *Id.* at 1092 & n. 5. *See Lewey v. H.C. Frick Coke Co.*, 166 Pa. 535, 547, 31 A. 261, 263 (1895); *Bowser v. Guttendorf*, 1988 Pa. Super. LEXIS 1424, 541 A.2d 377, 380 (1988); *Anthony v. Koppers Co.*, 284 Pa.Super. 81, 425 A.2d 428 (1980), *rev'd on other grds.*, 496 Pa. 119, 436 A.2d 181 (1981) ("as the rule has developed it has become clear that its basis is not concealment by the defendant but rather the ability of the plaintiff to discover . . . [her] injury or its cause." *Id.* at 95, 425 A.2d at 436); *see also Burnside v. Abbot Laboratories*, 351 Pa. Super. 264, 292, 505 A.2d 973, 988 (1985) ("[W]here the issue involves a factual determination regarding what is a reasonable period of time for a plaintiff to discover [her] injury and its cause the determination is for the jury.").

807, 88 L.Ed.2d 922 (1986) (also applying *Kubrick* rule to § 1983 claim).[12]

The *Kubrick* rule's distinction between a plaintiff's knowledge of her injury and knowledge of the defendant's causal connection to the injury is illustrated by the Fifth Circuit's decision in *Lavellee v. Listi*, 611 F.2d 1129 (5th Cir. 1980). In *Lavellee*, the plaintiff alleged that on September 8, 1976 he had been arrested and then transported to a hospital where he was forced by several defendant deputy sheriffs to undergo an extraction of his spinal fluid, a procedure performed by defendant medical personnel. He was then locked in a bare, unsanitary, padded cell where his pleas for an examination for the pain in his back were first met with threats of beatings, after which he was placed in irons and locked, hands and feet, to a drain pipe, in a fetal position. *Id.* at 1130. The plaintiff alleged that he was not allowed to see a physician until February 3, 1977, nearly five months later, at which time he first discovered that his back had been permanently injured. The plaintiff filed his action for medical malpractice and civil rights

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[12] While it is not necessary as yet for us to decide whether the defendants actively concealed their alleged unlawful conduct, as the complaint alleges, active concealment by a defendant tolls the running of the statute until a plaintiff discovers the cause of action or discovers facts that reasonably put her on notice of it. See Holmberg v. Armbrecht, 327 U.S. 392, 397, 66 S.Ct. 582, 585, 90 L.Ed.2d 743 (1946) (the equitable tolling doctrine "is read into every federal statute of limitations."); Plain v. Flicker, 645 F. Supp. at 902 (§ 1983 claim); Cohen v. McAllister, 673 F. Supp. 733, 739-740 (W.D. Pa. 1987). See also Redenz by Redenz v. Rosenberg, 360 Pa.Super. 430, 520 A.2d 883 (1987) (if tortfeasor actively conceals, statute of limitation tolled until injured person can overcome concealment).

(under § 1983) on January 10, 1978. Noting the one year limitations period borrowed from Louisiana law, the district court dismissed the plaintiff's civil rights and medical malpractice claims for the incidents occurring prior to January 10, 1977. The Fifth Circuit reversed and remanded the dismissal of the malpractice claim, arguing that:

> If the plaintiff was unaware of the permanence of his injury, and reasonably thought that the pains in his back were the normal result of a spinal tap or were caused by the alleged assaults, he cannot be deemed to have knowledge of the factual predicate of his claim or its connection with possible malpractice by the defendants. Until he suspected, or should have suspected, that his pain was not the result of a properly-conducted spinal tap or of the alleged assaults, he lacked any factual basis on which to suspect an invasion of his legal rights.

Lavellee v. Listi, 611 F.2d at 1131-1132.

In *Lavellee*, as with the present case, there is a crucial, if subtle, distinction between the plaintiffs' knowledge of his or her injury and knowledge of the causal connection between the injury and a particular defendant's actions. The plaintiff in *Lavellee* certainly knew or should have known soon after his involuntary spinal tap and shackling that somehow he had been injured at the hands

of the deputy sheriffs, just as the plaintiff in the case at bar knew that she had been sexually assaulted and injured by Mr. Wright. Nonetheless, the Fifth Circuit found that the plaintiff in Lavellee could not necessarily be expected to know that his permanent back injury was also proximately caused by an improperly conducted spinal tap operation by the defendant medical personnel Likewise, the critical question this Court now faces is whether Sowers knew or should have known that the school district, superintendent, principal and assistant principal had fostered an environment of deliberate indifference toward teacher abuse of female students which was a proximate cause of her injury.

The defendants argue that this action should be barred by the statute of limitations because: (1) defendants did not have a policy or custom of reckless indifference; (2) their conduct was not a cause of the plaintiff's injury; and (3) even if their conduct was found to be a cause of her injury, the plaintiff knew or should have known of that causal connection in late 1979 or early 1980, when school administrators pressured her to renounce her charges and publicly apologize to Wright.

The defendants direct this Court's attention to the Third Circuit's decision in *Sandutch v. Muroski*, 684 F.2d 252 (3d Cir. 1984), to recast the federal discovery rule for accrual of a cause of action as follows:

> that notice of improper conduct by government officials should lead a plaintiff, by the exercise of due diligence, to the awareness that he has a cause of action against the government officials based upon a conspiracy to violate his civil rights.

Defendants' Brief in Support, p. 7. This is an inaccurate statement of the holding of *Sandutch*,[13] as well as of the

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[13] Sandutch was a civil rights action against state prosecutors alleging a violation and conspiracy to violate the plaintiff's constitutional rights by obtaining a false confession from an alleged co-conspirator and using it to prosecute the plaintiff, Sandutch, for arson and murder. 684 F.2d 252. The false testimony linking Sandutch to the crime was given during a preliminary hearing and was introduced at his criminal trial. After the preliminary hearing but prior to trial the alleged co-conspirator recanted, saying his statements were made under duress. Sandutch's attorney attempted to introduce the taped recantation at the criminal trial, but the court excluded it. Several years later in September, 1980 (after Sandutch had been convicted and jailed) Sandutch obtained an affidavit from the alleged co-conspirator explaining the circumstances under which the false statement was obtained. Sandutch filed his civil rights action two weeks later, arguing that he neither knew nor had reason to know of his injury until he received the September, 1980 affidavit.

The Third Circuit found that Sandutch should have known of the alleged conspiracy because:

> although at that time Sandutch may not have known all the facts necessary to establish that the defendants conspired to deprive him of his right, his 1976 knowledge of the alleged falsity of [the alleged co-conspirator's] statement obtained under duress should have led, by the exercise of due diligence, to the awareness that he had a cause of action. The statute began to run then.

684 F.2d at 254. Nowhere in the Sandutch decision do we find any reference to the "notice of improper conduct" discovery rule represented to this Court by the defendants.

actual federal discovery rule. While the actual discovery rule delays accrual of a cause of action until a plaintiff knew or should have known of the injury and its causal connection to the defendant, the defendants' misstatement of the rule would have the cause of action accrue when the plaintiff receives "notice of improper conduct by government officials." *Id.* Defendants use this inaccurate statement of the rule to argue that Sowers' cause of action accrued at the time of her September, 1979 meeting with Smith and Miller at which she alleges the defendants engaged in "improper conduct," by attempting to intimidate, threaten and coerce her into retracting her allegations against Wright. *Id.* at 9. The defendants assert that "[s]urely the alleged overt and hostile conduct of Defendants at this meeting was sufficient, as a matter of law, to put [Sowers] on notice of the conspiracy." *Id.* However, the defendants' treatment of Sowers after the assault was not, and obviously could not have been, a cause of her assault. There is no al legation that Sowers knew of the defendants' handling of previous sex abuse complaints against teachers. Furthermore, there are many credible explanations for why observance of the defendants' conduct at the 1979 meetings might not be expected to lead her to the conclusion that there was a policy of reckless indifference (e.g., Sowers thought that the defendants simply did not believe her allegations). Merely because the plaintiff had witnessed some "improper conduct" by the defendants did not necessarily give her reason to know of an ongoing policy of reckless indifference to numerous complaints of

sexual abuse by teachers which might have been a proximate cause of her own injury.

In order for this Court to decide the statute of limitations question, we must consider the allegations of the plaintiff's complaint with relation to the "knew or *should have known* standard. As to the question of whether the plaintiff actually knew of her injury and the causal connection between her injury and the defendants' conduct, the plaintiff insists that it was not until Edward Wright's history of sexual abuse was revealed to the Bradford community in March, 1986 that she knew of the defendants alleged reckless indifference toward the problem. Bearing in mind our responsibility to construe the facts in the light most favorable to the plaintiff when ruling on a motion to dismiss, we must conclude for the purpose of this motion that it was not until March, 1986 that Sowers actually knew how the defendants' conduct was proximately caused her injury.

The more difficult question is whether or not Sowers should have known of the causes of her injury. The Third Circuit has stated that "[w]hether or when a plaintiff knows or has reason to know of the existence and cause of his or her injury will often turn on inferences drawn from disputed facts." *Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481, 487 (3d Cir. 1985) (affirming jury finding that plaintiff knew or had reason to know of cause of asbestos-related condition more than two years prior to lawsuit). We find it significant that the plaintiff's

complaint alleges more than one incident of abuse of female students by teachers prior to Wright's June, 1979 assault upon the plaintiff, with school officials taking only minimal disciplinary action in response.[14] We are not sure that these alleged prior incidents will prove a formal policy or custom, but as the Third Circuit stated in *Estate of Bailey By Oare v. County of York*, 768 F.2d 503 (3d Cir. 1985), "even in the absence of formal agency conduct, an 'official policy' may be inferred 'from informal acts or omissions of supervisory municipal officials'. . . . '[t]he issue of authorization, approval or encouragement is generally one of fact, not law.'" *Id.* at 506 (citations omitted) (*quoting Turpin v. Mailet*, 619 F.2d 196, 200, 201 (2d Cir.), *cert. denied*, 449 U.S. 1016, 101 S.Ct. 577, 66 L.Ed.2d 475 (1980); *see also Owen v. City of Independence*, 445 U.S. 622, 633-34 & n. 13, 655 n. 39, 100 S.Ct. 1406-07 & n. 13, 1417 n. 39, 63 L.Ed.2d 673 (1980). We believe that the plaintiff is entitled to offer evidence to support her claim that she did not know, and should not have been expected to know, that there existed an environment of reckless indifference toward sexual abuse of female students by teachers at the Bradford Area School District.

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[14] We view the plaintiff's allegations concerning the defendants' handling of sexual abuse incidents prior to the Sowers episode as relevant evidence of policy or custom of deliberate indifference toward such behavior by teachers. This does not mean that this Court has decided that evidence of subsequent acts may not also tend to prove the nature of a prior conspiracy. See, e.g., Grandstaff v. City of Borger, Tex., 767 F.2d 161, 171 (5th Cir.), cert. denied 55 U.S.L.W. 3607, 107 S.Ct. 1369, 94 L.Ed.2d 686 (1987).

We think the plaintiff is also entitled to an opportunity to engage in discovery and attempt to prove that the alleged practice, custom and/or policy of reckless indifference to students' complaints of sexual abuse of female students by male teachers was a proximate cause of her injury. The Third Circuit has stated that "[o]rdinarily, proximate cause cannot be determined on the basis of pleadings but instead requires a factual development at trial." *Estate of Bailey By Oare v. County of York*, 768 F.2d at 511 (*citing Black v. Stephens*, 662 F.2d 181, 190-91 (3d Cir. 1981), *cert. denied*, 445 U.S. 1008, 102 S.Ct. 1646, 71 L.Ed.2d 876 (1982) (jury question whether policy at issue proximately caused injury)). "Whether there is an 'affirmative link' between 'the adoption of any plan or policy express or otherwise' and the injury complained of is ordinarily an issue that requires a factual development." *Id.* at 511 (*quoting Rizzo v. Goode*, 423 U.S. 362, 371, 96 S.Ct. 598, 604, 46 L.Ed.2d 561, 569 (1976).

We think factual development will be necessary to make a determination as to whether the defendants alleged conduct was a proximate cause of the plaintiff's injury, and if the plaintiff knew or should have known of that alleged causal connection between the defendants' conduct and the sexual assault upon Sowers. We will therefore deny the defendants' motion to dismiss the action as barred by the statute of limitations.

IV. Qualified Immunity

The individual defendants Smith, Miller and Shuey also seek dismissal on the basis that their actions were within the scope of those actions protected by the doctrine of qualified immunity.[15] Qualified or "good faith" immunity is an affirmative defense that recognizes that government officials are entitled to some form of immunity from suits for damages. The Supreme Court, in *Harlow v. Fitzgerald*, held that:

> [G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of a person of which a reasonable person would have known.

457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396, 410 (1982). The individual defendants' eligibility for dismissal of this action under the qualified immunity doctrine turns on whether a reasonable person would have known that their conduct violated a clearly established constitutional right.

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[15] The defendants do not assert the qualified immunity defense on behalf of the school district, conceding that the doctrine does not apply to a municipal defendant. Defendants' Brief in Support, p. 19 n. 11 (citing Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980)).

These same defendants previously have raised the qualified immunity defense before this Court as a basis for granting them summary judgment in *Stoneking v. Bradford Area School Dist.*, another suit brought by a female student at the Bradford high school raising constitutional claims stemming from sexual abuse suffered at the hands of Edward Wright.[16] This Court held that the defendants were not entitled to qualified immunity, concluding that a reasonable person would have been aware that the plaintiff had a substantive due process right to be free from intrusions into her "personal privacy and bodily integrity." *Stoneking*, 667 F. Supp. 1088, 1102 (W.D. Pa. 1987). We stand by that conclusion, and deny the individual defendants' motion to dismiss on the basis of qualified immunity.

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[16] Wright's sexual abuse and harassment of Kathleen Stoneking began in the fall of 1980. The first incident of abuse consisted of Wright forcibly kissing her, and as time progressed the abuse greatly accelerated both in terms of frequency and intrusiveness. The assaults continued on an almost weekly basis until Stoneking's graduation in the spring of 1983. See Stoneking v. Bradford Area School Dist., 667 F. Supp. 1088, 1090 - 1091 (W.D. Pa. 1987).

ORDER

AND NOW, this 29th day of August, 1988, after careful consideration of the Defendants' Motion to Dismiss, and for the reasons set forth in the accompanying Memorandum Opinion,

IT IS HEREBY ORDERED that the Defendants' Motion to Dismiss is DENIED.

F. Order of U.S. Court of Appeals for Third Circuit, No. 88-3640, January 31, 1989

Sowers v. Bradford Area School District, et al.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3640

JUDY GROVE SOWERS

v.

BRADFORD AREA SCHOOL DISTRICT; FREDERICK SMITH, in his individual and official capacity as Principal of the Bradford Area High School; **RICHARD MILLER,** in his individual and official capacity as Assistant Principal of the Bradford Area High School; and **FREDERICK SHUEY,** in his individual and official capacity as Superintendent of the Bradford Area School District,

Frederick Smith, Richard Miller and Frederick Shuey,
Appellants

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 88-00057 E)
District Judge: Honorable Glenn E. Mencer

Submitted under Third Circuit Rule 12 (6)
January 26, 1989

BEFORE: GIBBONS, Chief Judge, and SEITZ and GREENBERG, Circuit Judges

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JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED and ORDERED that the order of the district court of August 29, 1988 be and is hereby affirmed.

The court notes that our jurisdiction is limited to review of the order of the district court insofar as it denied appellants' motion to dismiss on the ground of qualified immunity. *See Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817-18 (1985). Thus, our judgment should not be understood as affirming the order of the district court to the extent that it denied appellants' motions to dismiss on other grounds.

The court enters this order as it believes that *Stoneking v. Bradford Area School District*, 856 F.2d 594 (3d Cir. 1988), *cert.* petition pending, is essentially controlling here.

Costs taxed against appellants.

BY THE COURT,

/s/ Morton I. Greenberg

ATTEST:

/s/ Sally Mrvos, Clerk

January 31, 1989

G. Order of Supreme Court of the United States, No. 88-1350, April 3, 1989

Smith v. Sowers

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

April 3, 1989

Mr. Kenneth D. Chestek
Murphy, Taylor, et al.
518 State Street
Erie, PA 16501

Re: Frederick Smith, individually, and as Principal, Bradford Area High School, et al., v. Judy Grove Sowers
No. 88-1350

Dear Mr. Chestek:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. ____ (1989).

Very truly yours,

/s/ Joseph F. Spaniol, Jr.,
Clerk

H. Opinion and Order, U.S. District for Western District of Pennsylvania, No. 87-63 E., August 28, 1988, reported at 667 F.Supp. 1088 (1987)

Stoneking v. Bradford Area School District, et al.

Kathleen Stoneking,

Plaintiff

v.

Bradford Area School District;
Frederick Smith, in his
individual and official capacity as principal
of Bradford Area High School; **Richard Miller,**
in his individual and official capacity as
assistant principal of the Bradford Area High
School and **Frederick Shuey**, in his individual
and official capacity as Superintendent of
the Bradford Area School District,

Defendants

Civil Action No. 87-63 E

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

667 F. Supp. 1088; 1987 U.S. Dist. LEXIS 7950

August 28, 1987

COUNSEL:

Deborah W. Babcox, Esquire, Pecora Duke & Babcox, for Plaintiff.

Kenneth D. Chestek, Esquire; James D. McDonald, Jr., Esquire, for Defendants.

OPINION

MENCER, J.

I. INTRODUCTION

On March 24, 1987, Kathleen Stoneking filed a civil rights action against Bradford Area School District ("School District"), Frederick Smith, the Principal of the Bradford Area High School, Richard Miller, the Assistant Principal of the Bradford Area High School and Frederick Shuey, the Superintendent of the School District.[17] The gravamen of the complaint is that the defendants violated the constitutional rights of the plaintiff by failing to remedy the situation that existed at the Bradford Area High School. According to the allegations in the complaint, the individual defendants knew or recklessly failed to discover that Edward Wright, the band director at the High School, was sexually assaulting female members of the band. Additionally, it is alleged that the School District had a practice or custom of failing to appropriately respond to

[17]Pursuant to an order entered May 22, 1987, this case was consolidated for trial with similar actions filed on behalf of Kim Harbaugh and Lisa Rovito. Motions for summary judgment were filed in the Harbaugh and Rovito cases on April 13, 1987. At that time, the parties provided the court with extensive briefs and voluminous deposition testimony. The motions, briefs and deposition transcripts from the Harbaugh and Rovito cases have been adopted for the purposes of the pending summary judgment motion. Reliance on those briefs will simply be noted by reference to the "Companion Case."

complaints by female students of sexual abuse or harassment perpetrated by male teachers.

The defendants have filed a motion for summary judgment. As set forth in their brief, the first ground for the motion is that the plaintiff failed to file her complaint in a timely fashion. The defendants also assert that the plaintiff failed to identify a constitutional right which has been violated. The defendants contend that as a matter of law there is no § 1983 claim because there is no individual liability nor is there any policy, practice or custom which would implicate the School District. In the alternative, it is asserted that defendants Smith, Miller and Shuey are entitled to qualified immunity. Finally, the defendants assert that the complaint fails to set forth state law violations.

After consideration of the briefs, the voluminous deposition testimony and the relevant case law, this Court concludes that: (1) there are genuine issues of material fact pertaining to the statute of limitations; (2) the plaintiff has alleged a violation of a well-established constitutional right; (3) there are genuine issues of material fact pertaining to the liability of defendants Smith, Miller and Shuey; (4) there are genuine issues of material fact regarding the existence of an "official practice or custom;" (5) defendants Smith, Miller and Shuey are not shielded from liability by the defense of qualified immunity and (6) the complaint does fail to set forth state law claims. Therefore, this Court shall deny the motion for summary judg-

ment filed on behalf of the defendants, as it pertains to Counts I, III, V and VII[18], and grant the motion as it pertains to Counts II, IV and VI.

II. FACTUAL BACKGROUND

In August, 1975, Edward Wright was hired by the Bradford Area School District to serve in the capacity of band director. Mr. Wright was responsible for instructing band activities and providing students with music lessons. Under Mr. Wright's direction, the high school band and individual band members were extremely successful in both regional and remote competitions. The band came to be the pride and joy of the school and the community. As the band's acclaim grew, so too did the acclaim of Edward Wright.

Three and a half years into Mr. Wright's tenure, a young woman by the name of Judy Grove[19] came forward and informed Dr. Smith, the School Principal and Mr. Miller, the Assistant Principal, that the band director had sexually assaulted her. At that time, Ms. Grove openly acknowledged that she had been drinking prior to the assault and that the assault had taken place at Mr. Wright's residence.

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[18]The final count in the complaint was mislabeled "Count V." It should, however, be Count VII.

[19]Since graduating from high school Judy has gotten married and her legal name is Judy Grove Sowers. For the purposes of this opinion, however, the Court will use the witness's maiden name.

The details of the events that followed Ms. Grove's disclosure are vigorously contested. All parties agree, however, that Dr. Smith ultimately appeared before the band to quiet the "rumors" and to encourage the band to work together again.

Mr. Wright's sexual abuse and harassment of Kathleen Stoneking began in the fall of 1980. The first incident of abuse consisted of Mr. Wright forcibly kissing Ms. Stoneking. As time progressed, the abuse greatly accelerated both in terms of frequency and in terms of intrusiveness. The sexual abuse continued, on an almost weekly basis, until Ms. Stoneking graduated from high school in the spring of 1983. As reported by the plaintiff, there were isolated incidences of abuse that occurred as late as May, 1985.

In early March, 1986 William Smith, Frederick Smith's son, informed his father that Mr. Wright was sexually assaulting female band members. Almost immediately after this information was conveyed to Dr. Smith, the School District responded. The parents of other students who had been assaulted were contacted. Several meetings followed which were attended by various administration officials, the parents of some of the girls who had been assaulted and the girls themselves. Mr. Wright was suspended as of March 10, 1986 and later resigned from his job. Subse-

quently, Edward Wright pled guilty to a ten count indictment.[20]

III. STANDARD FOR SUMMARY JUDGMENT

In reviewing a motion for summary judgment, the Court is governed by the standard set forth in Fed.R.Civ.P. 56(c). In pertinent part the Rule provides "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine Issue as to any material fact and that the moving part is entitled to judgment as a matter of law."

The application of this standard requires that "[i]nferences to be drawn from the underlying facts contained in the evidential sources submitted to the trial court must be viewed in the light most favorable to the party opposing

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[20]On a number of occasions, the defendants raised the issue of "consent." Accordingly, during the course of the depositions the girls who had been assaulted by Mr. Wright were quizzed on why they failed to "kick, slap, bite, hit, or knee" their teacher, Mr. Wright.

On November 6, 1986, Edward Wright plead guilty to criminal charges, including four counts of indecent assault. One of the elements of indecent assault is *lack of consent*. *See* 18 Pa. C.S.A. § 3126. By pleading guilty to the criminal charges Mr. Wright admitted that his victims had not consented.

The fact that Kathleen Stoneking choose not to immediately report the criminal acts of Edward Wright is, for the purpose of this proceeding, irrelevant. *Cf. Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399 (1986) (The Court held that "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome'" *Id.* at 2406).

the motion." *Baker v. Lukens Steel Co.*, 793 F.2d 509, 511 (3d Cir. 1986), citing, *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*. 429 U.S. 1038 (1977). Therefore, this Court must resolve all doubt, as to the existence of a genuine issue of material fact, in favor of the plaintiff.

IV. LEGAL DISCUSSION

A. Statute of Limitations

In its recent decision of *Wilson v. Garcia*, 471 U.S. 261 (1985), the Supreme Court declared that all actions brought pursuant to 42 U.S.C. §1983 shall be characterized as personal injury actions and are subject, therefore, to the applicable state statute of limitations. In reaching this conclusion the Court instructed that: "[t]he characterization of § 1983 for statute of limitations purposes is derived from the elements of the cause of action, and Congress' purpose in providing it. These, of course are matters of federal law. . . . [However,] the length of the limitations period, and closely related questions of tolling and application, are to be governed by state law." *Id*. at 268-69. Therefore, for claims arising in Pennsylvania, federal courts must apply the two year statute of limitations set forth in 42 Pa. C.S.A. § 5524 (2). *See Sullivan v. City of Pittsburgh*, 811 F.2d 171, 180 (3d Cir. 1987); *Smith v. City of Pittsburgh*, 764 F.2d 188, 194 (3d Cir.), *cert. denied*, 106 S. Ct. 349 (1985). Additionally, federal courts are bound to apply state tolling rules.

The well-established rule, regarding the tolling of the statute of limitations, is that the statute begins to run when the liability-creating act is committed. *See Bernath v. LeFever*, 325 Pa. 43, 47, 189 A. 342, 344 (1937) ("there is no evidence in the present record. . . which, from whatever angel viewed, would justify a postponement of the operation of the statute beyond the time 'when the injury was done.'"). In order to prevent the harsh results that would occur if that rule were applied in all situations, the courts have created an exception. This exception is known as the discovery rule. *See Lewey v. H. C. Frick Coke Co.*, 166 Pa. 536, 547, 31 A. 261, 263 (1895).

The Pennsylvania Superior Court discussed applicability of the discovery rule in *Anthony v. Koppers Co.*, 284 Pa. Super. 81, 425 A.2d 428 (1980), *rev'd on other grds.* 496 Pa. 119, 436 A.2d 181 (1981). In that case, the court explained that, "the discovery rule is a judicial creation, fashioned to solve a specific problem, namely, whether the law should preclude recovery for an injury that not even a diligent party may reasonably be expected to discover." *Anthony*, 284 Pa. Super. 89, 425 A.2d at 432. The court went on to note that although the exception, as it was first applied involved the concealment of injury, "as the rule has developed it has become clear that its basis is not concealment by the defendant but rather the ability of the plaintiff to discover . . . [her] injury or its cause." *Anthony*, 284 Pa. Super. at 95, 425 A.2d at 436 (emphasis added). Thus, when the discovery rule is applicable the statute of limitations will not start to run until the plaintiff actually discov-

ers the injury and the cause of the injury or reasonably should have discovered such.[21]

The role of the court in evaluating a plaintiff's assertion that the discovery rule should apply is limited.[22] The court must decide whether there is sufficient evidence by which a jury could reasonably decide that the plaintiff did not discover the injury or its cause until after the occurrence of the liability-creating act. Once a court makes that

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[21]Although the Pennsylvania Superior Court modified the discovery rule in *Cathcart v. Keen Industrial Insulation*, 324 Pa. Super. 123, 471 A.2d 493 (1984), that modification does not impact on the instant action. The court in *Cathcart* concluded that "an allegation of mere difficulty in identifying defendants . . . [is] not sufficient to toll the running of the statute of limitations." 324 Pa. Super. at 139, 471 A.2d at 501. Significantly, the court expressly decided not to overrule, *Grubb v. Albert Einstein Medical Center*, 255 Pa. Super. 381, 387 A.2d 480 (1978), an earlier case where the statute of limitations was tolled because the plaintiff had been unable to determine the causal relation between her injuries and the manufacturer of a medical instrument that allegedly caused her injuries. This Court concludes that the factual situation in the instant action is more akin to *Grubb*, than *Cathcart*.

[22]In evaluating an assertion that a claim is time barred, it is essential to keep in mind which party bears the applicable burden. Since the statute of limitations defense is an affirmative one, *see* Fed. R. Civ. P. 8 (c), the defendant bears the initial burden. If the plaintiff's response to this defense is that the statute of limitations should not run from the time the tortious act was committed, but rather from a later date when the plaintiff discovered the injury and its cause, i.e., if the plaintiff is relying on the discovery rule, then the burden shifts to the plaintiff. *Van Buskirk v. Carey Canadian Mines, Ltd*, 760 F.2d 481, 487 (3d Cir. 1985). The plaintiff must allege and thereafter prove that she did not have knowledge of her injury or the cause of that injury until some date after the liability creating act occurred. *Id.* Additionally, the plaintiff must prove that she was diligent in her efforts to discover the injury or the cause in a reasonable period of time. *Bickell v. Stein*, 291 Pa. Super. 145, 150, 435 A.2d 610, 612 (1981).

determination the remaining questions are for the jury. As the court in *Burnside v. Abbot Laboratories*, 351 Pa. Super. 264, 292, 505 A.2d 973, 988 (1985), recently pointed out: "[W]here the issue involves a factual determination regarding what is a reasonable period of time for a plaintiff to discover . . . [her] injury and its cause the determination is for the jury." *See also Taylor v. Tukanowicz*, 290 Pa. Super. 581, 586, 435 A.2d 181, 183 (1981).

In the instant action the plaintiff asserts that she did not discover that the individual defendants were the cause of her injuries until the School District took affirmative action to discipline and discharge Edward Wright.[23] Those events occurred in March, 1986. Thus, plaintiff contends that the two year statute of limitations should not run from that date. Defendants, on the other hand, insist that plaintiff was aware of the requisite facts at least by the time she graduated from Bradford Area High School, in June, 1983.[24]

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[23]Technically, Mr. Wright was given an option to resign. Although he later exercised that option, it appears as though he had little choice in the matter.

[24]The defendants, opposition to the application of the discovery rule is somewhat tenuous. In order to have the requisite knowledge which would preclude the application of the discovery rule, prior to the running of the limitation period Ms. Stoneking would have had to have *known* that Judy Grove was in fact sexually assaulted by Edward Wright. Ms. Stoneking would have had to have *known* that the defendants received notice of the assault. Additionally, the plaintiff, would have had to have known that the defendants knew that Judy's allegations were true and that in, light of that information they choose to disregard Judy's complaint. Thus, in order to be precluded

In addressing the court's role in determining whether a claim is time barred, the third circuit offered the advice that "[s]ince the applicability of the statute of limitations usually involves question of fact for the jury, defendants bear a heavy burden in seeking to establish as a matter of law that the challenged claims are barred." *Van Buskirk v. Carey Canadian Mines, LTD*, 760 F.2d 481, 498 (3d Cir. 1985). Reviewing the available evidence in the light most favorable to the plaintiff, this Court concludes that the defendants have not satisfied that heavy burden. There are genuine issues of material fact pertaining to the tolling of the statute of limitations. Therefore, the motion for summary judgment, as it pertains to the statute of limitations defense, is denied.

B. Evaluation of Section 1983 Claim

1. Identification of constitutional right

In pertinent part 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the depri-

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from the application of the discovery rule, the plaintiff would have had to have *known* that certain events occurred, events that the defendants vigorously contend never did occur.

> vation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

The crux of any section 1983 action is a violation of a protected constitutional right. Thus, identification of the specific right is "not a mere academic exercise and is necessary in determining whether a cause of action may be maintained under § 1983." *Metcalf v. Long*, 615 F. Supp. 1108, 1113 (D.C. Del. 1985). *See also Fox v. Custis*, 712 F.2d 84, 87 (4th Cir. 1983).

In the complaint, plaintiff alleges that the defendants, acting under color of state law, deprived her of her rights, privileges and immunities as secured by the Constitution. More specifically, the plaintiff alleges that she was deprived of her liberty interest which entitled her to be free from the constant threats, intimidation, sexual abuse and sexual harassment perpetrated by Edward Wright. Although the plaintiff does not expressly link her claim to the substantive due process clause of the fourteenth amendment, identification of the liberty interest serves that purpose. The critical question is whether such a right is cognizable under the fourteenth amendment.

In discussing the breadth of the fourteenth amendment the district court in *Metcalf* pointed out:

> Substantive due process is a nebulous term, the meaning of which readily changes depending on the context of the particular situation. Substantive due process derives from the idea that the framers of the Constitution intended to protect rights other than those specified. In deciding that certain rights not specified in the constitution are protected by the due process clause, the Court has looked to those rights which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Metcalf, 615 F. Supp. at 1120. A review of the case law will assist in the task of determining whether the rights asserted by the plaintiff are so rooted in tradition and conscience to rise to the ranks of fundamental.

The Supreme Court's decision in *Ingraham v. Wright*, 430 U.S. 651 (1977) is instructive in this area. The issue in *Ingraham* revolved around the use of corporal punishment in public schools. After deciding that the eighth amendment offered the school students no protection, the Court turned its attention to the fourteenth amendment due process clause.

In a summary fashion, the Court concluded that "where school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we

hold that Fourteenth Amendment liberty interests are implicated." *Ingraham*, 430 U.S. at 674. Thus, the Supreme Court recognized the existence of a substantive right to be free from bodily abuse.

Admittedly, the liberty interests asserted in the instant action are not identical to those asserted and recognized by the Supreme Court in *Ingraham*. However, common sense suggests that the right to be free from sexual abuse is at least as fundamental as the right to be free from the less intrusive physical abuse of paddling. The Supreme Court's view that corporal punishment implicates a constitutional liberty interest is persuasive evidence that allegations of sexual abuse and sexual harassment would raise to the same level.

Ingraham does not stand alone in this area; there are other cases that recognize a similar constitutional right. In *Doe v. New York City Department of Social Services*, 649 F.2d 134 (2d Cir. 1981) (*Doe I*), the issue was whether a state agency could be liable for failing to protect a child from the physical and sexual abuse inflicted by the child's foster father. The court did not identify the specific constitutional right that formed the basis for the § 1983 action, but it did devote significant discussion to the liability issue. It must be noted that in the absence of a constitutional violation there would be no need to consider liability. Thus, by inference alone, it can be concluded that the court in *Doe I* found that there existed a constitutional right to be free from physical and sexual abuse. *See also*

Doe v. New York City Department of Social Services, 709 F.2d 782 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983) *(Doe II)*.[25]

This Court also finds *P.L.C. v. Housing Authority of the County of Warren*, 588 F. Supp. 961 W.D. Pa. 1984) and *Doe "A" v. Special School District of St. Louis County*, 637 F. Supp. 1138 (E.D. Mo. 1986) to be persuasive. The plaintiff in *P.L.C.* brought a § 1983 action against the Authority after she was raped by the defendant's employee who entered her apartment with a key provided by the Housing Authority. In a summary fashion, Judge Weber noted that "plaintiff's right to be free from such bodily injury and harm is a right of constitutional magnitude." *P.L.C.*, 588 F. Supp. at 962.

The district court in *Doe "A"* reached a similar conclusion. That case was instituted by nine handicapped children who were physically beaten and sexually abused by the individual who drove them back and forth to school. The court's discussion, regarding the existence of a constitutional right, is insightful.

> The acts of abuse alleged by plaintiffs state a substantive due process claim. The acts intrude

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[25]In an opinion written by Judge Sloviter, sitting by designation on the Second Circuit, the court reversed the granting of a judgment notwithstanding the verdict. Accordingly, the court held that the evidence was sufficient for a jury to conclude that the state agency, acted with deliberate indifference in regard to the plaintiff's physical safety.

> upon the personal privacy and bodily integrity of these children. The acts intrude in ways more personal and private than a jailhouse beating and in ways which will surely leave psychological scars long after physical healing is complete. Moreover, these acts are keenly distressing given the helplessness and blamelessness of the victims. . . . The alleged acts of defendant Cerny [busdriver] and the alleged tolerance of these acts by SSD [the School District] and the individual defendants pass beyond the pale of common law torts. They shock the conscience of this Court.

Doe "A", 637 F. Supp. at 1145. Although this Court is not bound by the holding in *Doe "A"* it deliberately adopts that court's well-reasoned rationale and conclusion.[26]

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[26]Additional support for this conclusion can be adduced from *Estate of Bailey by Oare v. County of York*, 768 F.2d 503 (3d Cir. 1985). That case was brought by a father, on behalf of himself and his deceased child, after the brutal abuse inflicted on his daughter resulted, in her untimely death. In reviewing the district court's Fed. R. Civ. P. 12(b)(6) dismissal, the appellate court noted: "Significantly, the court did not hold that Aleta or her father did not have a cognizable constitutional right. *There is a liberty interest in being free from physical assault* that can be fairly attributed to the action of a state." *Id.* at 509 n.7 (emphasis added).

This court does not view the physical abuse that rose to a constitutional right in *Estate of Bailey*, to be qualitatively different from the infliction of sexual abuse and harassment experienced by the plaintiff in the instant action.

Therefore, this Court holds that the constitutional right, to be free from state intrusions into the realm of personal privacy and bodily security, in the ways alleged in the complaint, is well-established in law. The acts of sexual abuse, sexual harassment and intimidation inflicted by Edward Wright on Kathleen Stoneking, literally shocks the conscience of this Court. As evidenced by the case law, abuse of this type is not tolerated when the victim is a prison inmate or a patient in a state hospital. *See, e.g., Withers v. Levine*, 615 F.2d 158 (4th Cir.), *cert. denied*, 449 U.S. 849 (1980)[27]; *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974).[28] Clearly then, the constitution must offer school children similar protection. Thus, the Court unequivocally rejects the defendants, assertion that the facts of this case fail to support a violation of a constitutional right.

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[27]The issue in *Withers* was whether the plaintiff had an eighth amendment right to be free from abuse inflicted by fellow prisons. Accordingly, the court held: "A prisoner has a constitutional right 'to be reasonably protected from the constant, threat of violence and sexual assault from his fellow inmates.'" *Withers*, 615 F.2d at 161.

[28]The action in *Spence* was brought on behalf of a son who had been beaten to death by fellow patients in a state mental hospital. The plaintiff alleged that the defendants recklessly ignored the twenty odd beatings that had previously occurred. In reviewing a dismissal of the action, the appellate court held that, "[a]ssuming, as we must on a motion to dismiss, that the plaintiff can prove these allegations, the defendants inaction was of sufficient magnitude to constitute a deprivation of rights under § 1983." *Spence*, 507 F.2d at 557.

2. Color of State Law

a. Individual defendants

The next step in the evaluation of the plaintiff's § 1983 claim is determining whether the individual defendants owed a specific duty to the plaintiff. It must then be determined whether there is evidence of a breach of that duty.

i. Defendants' duty

The resolution of the first part of this issue is complicated by the fact that neither Defendant Smith, Defendant Miller nor Defendant Shuey committed the abusive acts that are alleged in the complaint. Therefore, in order to establish the requisite duty, the plaintiff must show the existence of a "special relationship" between the individual defendants and herself.[29]

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[29]In support of their position that there is no special relationship between themselves and the plaintiff, the defendants point out that a teacher is not considered a "person responsible for the child's welfare," *see* 11 P.S. § 2203, and does not, therefore, fall within the purview of the Child Protective Services Law. *See Pennsylvania State Educ. Assoc. v. Department of Public Welfare*, 68 Pa. Cmwlth. 279, 449 A.2d 89 (1982). Thus, defendants Smith, Miller and Shuey were under no statutory duty to report suspected instances of sexual assault that occurred in the Bradford Area High School.

The Court is not persuaded that the failure of the State to impose a statutory duty, to mandatorily report suspected cases of child abuse perpetrated by school teachers, is controlling in this case. In ruling as it did in *Pennsylvania State Education*, the Commonwealth Court merely concluded that the Child Protective Services Law as intended to focus on and remedy abuse that occurred within the structure of a family or a family-like environment. Accordingly, the court observed that "the clear import of . . . [the

The Supreme Court's opinion in *Martinez v. California*, 444 U.S. 277 (1980) opened the door to the concept that "duty" in a constitutional tort could be contingent on the finding of a special relationship. In *Martinez* a civil rights action was brought by the parents of a young woman who was murdered by a state parolee. Although the focus of the dismissal was on lack of causation--the murder did not occur until five months after the parole--the Supreme Court did imply that under a different set of circumstances, at least a duty might be imposed. *See Martinez*, 444 U.S. at 285.

Courts were quick to pick up on the Supreme Court's implications. Thus, in certain § 1983 cases the focus became the nature of the relationship between the plaintiff and the state actor.[30] *See, e.g., Estate of Bailey*, 768 F.2d

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statutory language] is that persons responsible for the child's welfare customarily provide such matters as housing, clothing, furnishings, income and medical care for children in their care." *Pennsylvania State Education*, 68 Pa. Cmnwlth. at 283, 449 A.2d at 92. Teachers do not serve those functions and are not, therefore, covered by the Act.

Notwithstanding the court's observation, regarding the noncustodial role of teachers, teachers and school administrators do stand in a special relationship with students. Children are required by law to attend school. *See* 24 P.S. § 13-1327. And authority over children who attend their schools. *See* 24 P.S. § 13-1317. Clearly, then there is a special relationship that exists among these parties.

[30]Interestingly, some courts have identified the "special relationship" as a relationship between the plaintiff and the third person who committed the wrongful act. For example, in *Humann v. Wilson*, 696 F.2d 783, 784 (10th

at 510; (action brought by father against agency charged with protecting child from abusive family situations); *Fox v. Curtis*, 712 F.2d 84 (4th Cir. 1983); (action brought against state corrections employees who were charged with postrelease supervision of a parolee); *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982); Doe I, 649 F.2d 134 (action brought against state agency charged with overseeing foster care placements); *P.L.C.*, 568 F. Supp. 961 (action brought by female resident against Housing Authority).

The court's opinion in *Bowers v. DeVito* is worth additional consideration. That case was brought on behalf of a woman who was murdered by a person who had been recently released from a state mental facility. The offender had a seven year record of severe mental health problems and was known by the state actors to be extremely violent. In affirming the summary judgment order, entered on behalf of the State, the appellate court announced that "there is no constitutional right to be protected by the state against being murdered by criminals or madmen." *Bowers*, 686 F.2d at 618. The court did go on to qualify that statement, however.

> We do not want to pretend that the line between action and inaction, between inflicting

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Cir. 1983) it was noted: "the Court considered the fact that the plaintiffs' decedent did not stand in any special relationship to the parolee from which the parole officers might have inferred a special danger to her."

> and failing to prevent the infliction of harm is clearer than it is. *If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.* It is on this theory that state prison personnel are sometimes held liable under § 1983 for the violence of one prison inmate against another.

Id. (emphasis added).

Returning to the instant action, it is clear that although the plaintiff was not within the custodial care of the defendants, she did spend a large part of her day in an environment where defendants had ultimate control. As principal, assistant principal and superintendent of the Bradford Area High School, the defendants possessed certain power and were cloaked with certain authority.[31] These defendants were charged with the duty of ensuring that the school environment was a safe one for students. Therefore, this

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[31] 24 P.S. § 13-1317 specifically provides:

> Every teacher, vice principal and principal in the public schools shall have the right to exercise the same authority as to conduct and behavior over the pupils attending his, school, during the time they are in attendance, including the time required in going to and from their homes, as the parents, guardians or persons in parental relation to such pupils may exercise over them.

Court concludes that a special relationship exits between the plaintiff and the individual defendants.

ii. Breach of duty

The next issue before this Court is whether the defendants have breached their duty to the plaintiff. The defendants assert that any professional decisions they made are presumptively correct and that liability could not attach under such a circumstance. Accordingly, the defendants rely on the Supreme Court's decision in *Youngberg v. Romeo*, 457 U.S. 307 (1982).

The issue in *Youngberg* involved the due process rights of an individual committed to a state institution for the mentally retarded. After holding that the plaintiff had certain due process rights, the Court went on to explain that those rights were not absolute. Rather, the Court advised, a balance must be reached between the rights of the individual and the day-to-day demands realized by the institution. In recognizing this balance, the Supreme Court adopted the position set forth by Chief Judge Seitz's in his concurring opinion.

Accordingly, the Supreme Court held:

> We think the standard articulated by Chief Judge Seitz affords the necessary guidance and reflects the proper balance between the legitimate interests of the State and the rights of the involuntarily committed to reasonable

> conditions of safety and freedom from unreasonable restraints. He would have held that 'the Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally, acceptable choices should have been made.'

Youngberg, 457 U.S. at 321.

The Supreme Court went on to hold that in deciding what is "reasonable" the courts must afford deference to the judgment of professionals. Thus:

> the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.

Id. at 323.

The defendants in the instant action argue that since the plaintiff's claim of liability is based on policy decisions made by Shuey, Smith and Miller, i.e., failing to investigate Wright's background before hiring him and failing to detect and/or investigate students, complaints of abuse, *Youngberg* controls. "Neither this Court nor any jury is permitted to substitute its judgment for that of the profes-

sionals to whom these matters are properly delegated." *See* Defendants Brief Submitted in Companion Case at 24. Therefore, according to the defendants, the policy decisions are presumptively correct and the plaintiffs, basis for liability must fail.

The flaw in defendants, argument is that it fails to take into account the situation where a decision, though made by a professional, is a "substantial departure from accepted professional judgment, practice or standards." In such a case the presumption of correctness is negated. The plaintiff must be afforded an opportunity to rebut the presumption of correctness.[32]

In opposition to the defendants, motion for summary judgment, the plaintiff submitted the affidavit of Dr. Chet C. Kent, Superintendent of Keystone Oaks School District, Pittsburgh, Pennsylvania. The affidavit states that the policies adopted by the defendants, for dealing with suspected cases of sexual assault or sexual harassment, deviated significantly from the norm. *See* Affidavit of Dr.

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[32]As the Supreme Court noted in *Youngberg*:

> All members of the Court of Appeals agreed that respondents' [plaintiff's] expert testimony should have been admitted. . . . [W]e have no reason to disagree with the view that the evidence was admissible. It may be relevant to whether petitioners' [defendants'] decisions were a substantial departure from the requisite professional judgment.

Youngberg, 457 U.S. at 323.

Kent at 14, 18-22. Based on the affidavit of Dr. Kent, this Court concludes that there are genuine issues of material fact pertaining to the question of defendants, compliance with "accepted professional judgment, practice or standards."

iii. Applicable standard

The final inquiry pertaining to the liability of the individual defendants is the standard to be applied. In its recent decision of *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662 (1986), the Supreme Court held that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty or property." *Id.* at 663. Thus, it has been held that more than mere negligence is needed to establish liability on the part of state actors.

Despite defendants, allegations that "the record is bare of any conduct of these defendants that even begins to approach the requisite standard," see Defendants, Brief Submitted in Companion Case at 21, this Court finds that the plaintiff has presented sufficient evidence to suggest that there is a genuine issue of material fact. In addition to the affidavit of Dr. Kent, there is evidence by which a jury could conclude that: (1) the defendants were reckless in their handling of the 1979 incident involving Judy Grove Sowers; (2) the defendants were reckless in their failure to investigate other reported incidents involving Mr. Wright and female students and (3) the defendants were reckless

in their attempts to remedy and/or rectify the problems involving Mr. Wright. In light of this evidence this Court holds that the issue of liability is one for the jury to decide.[33]

b. Liability of the School District

The pivotal case in the area of municipal liability under § 1983 is *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978). Reversing its earlier decision in *Monroe v. Pape*, 365 U.S. 167 (1961), the Supreme Court in *Monell* held that a municipal corporation is a person for purposes of § 1983. Therefore, a municipality may be liable for damages that arise out of a violation of a constitutional right. As determined by the Court in *Monell*, however, municipal liability is not without limits.

In addressing the exposure of municipal corporations to § 1983 liability, the *Monell* Court excluded liability based on principles of respondent superior. The Court noted: "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some

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[33]The defendants also contend that there is no evidence that their acts were the cause of the injuries sustained by the plaintiff. Again, this Court concludes that this issue is one best left for, the jury. The deposition testimony suggests that the defendants handling of the incident involving Judy Sowers Grove provided Mr. Wright with additional ammunition with which to coerce and/or manipulate the plaintiff. *See* Deposition of Kathleen Stoneking at 225, 250-51 (September 12, 1986). *See also* Deposition of Kim Harbaugh at 409-16, 432-34; Deposition of Lisa Rovito at 173, 234.

nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor." *Monell*, 436 U.S. at 691. Rather, "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694.

The Court in *Monell* did not delve into the differences between a "policy" and a "custom," but did point out that municipal liability could attach if either were established. Advisedly, the Court noted:

> although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" *even though such a custom has not, received formal approval through the body's official decision-making channels.*

Id. 690-91 (Emphasis added).

In recent cases the Supreme Court has expounded on the issue of "municipal liability." *See, e.g., Brandon v. Holt*, 469 U.S. 464 (1985); *City of Oklahoma City v. Tuttle*, 471

U.S. 791 (1985). The Court's holding in *Brandon* is particularly instructive.

Brandon was instituted by individuals who had been "viciously assaulted" by a Memphis City police officer; the action was filed against the director of the police department in his official capacity. In awarding the plaintiffs compensatory damages the district court concluded that the director of the department, although *without* actual knowledge, should have known that the police officer who perpetrated the attack had "dangerous propensities." Holding that the director was shielded from liability by the doctrine of qualified immunity, the appellate court reversed the district court's decision.

The Supreme Court was of a different opinion. The Court concluded that "judgment against a public servant, in his official capacity, imposes liability on the entity that he represents provided, of course, the public entity received notice and an opportunity to respond." *Brandon*, 469 U.S. at 471-72. Thus, liability imposed on the Director of the City Police, in his official capacity, would result in liability on the part of the municipal entity.

Decided just a few months after *Brandon*, the Court's decision in *Tuttle* addresses a different aspect of municipal liability. In *Tuttle* the Court was called on to decide whether jury instructions in a "failure to adequately train" case comported with the applicable law. In reaching its decision that the charge did not comport with the law, the

Court expounded on the requirement of an official custom or policy.

The Court attempted to distinguish the difference between a policy or custom that was itself unconstitutional and one that was not.[34] The Court set forth the following parameters.

> Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker. Otherwise the existence of the unconstitutional policy, and its origin, must be separately proved. But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation.

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[34]The Supreme Court expressly declined to rule on the issue of whether a policy that was not itself unconstitutional could ever meet the policy requirement of *Monell*. *Tuttle*, 471 U.S. at 804 n.7.

Read together, *Brandon* and *Tuttle* seem to suggest at least two conclusions. First, if a "municipal servant" is found to be liable, in his or her official capacity, for constitutional violations, then, the municipality will also be liable. Second, if a policy, practice or custom of a municipal entity is not itself unconstitutional, liability will only attach if there is proof of more than a single episode of a constitutional deprivation.

In the instant action, the plaintiff alleges that the School District, acting through Dr. Smith, Mr. Miller and Mr. Shuey, had a practice or custom of failing to take appropriate action with respect to teachers who posed a threat to the health, safety and welfare of female students. More specifically, the plaintiff alleges that the School District failed to investigate reports of sexual abuse and permitted teachers to remain in charge of extracurricular activities despite the knowledge that these teachers presented a danger to female participants. According to the plaintiff, the above mentioned practice or custom of the School District was the proximate cause of her injuries.

In order to determine whether the School District, acting through its agents, had a practice or custom that "caused" the plaintiff's injuries, such that municipal liability will attach, this Court must review the allegations and depositions. The first incident that purports to support the

inference that the defendants had a practice or custom occurred in late 1977 or early 1978.[35]

According to the deposition testimony of Theresa Rodgers, she was sexually accosted by her social studies teacher, Rodgers, Richard DeMarte, in her senior year. Ms. Rodgers testified that she immediately reported this incident to Mr. Miller and Dr. Smith, whereupon she was warned that it was going to be her word against Mr. DeMarte's and that she should not go home and tell her parents about the assault. Ms. Rodgers further testified that the principal suggested that she stay away from Mr. DeMarte, if at all possible, and then counselled her that he would take care of it. Deposition of Theresa Rodgers at 113-14.

Despite Dr. Smith's assurance that "he would take care of it," Theresa Rodgers was never informed of any action taken against Mr. DeMarte. Mr. DeMarte's personnel file, maintained by the School District, conspicuously lacks any record of disciplinary action taken against him during the pertinent time period. In fact, Dr. Smith gave Mr. DeMarte a perfect score on his teaching evaluation, remarkably, an evaluation that included assessment of "emotional stability," "social adjustment," "judgment" and "habits of conduct." *See* Plaintiff's Exhibit 4 filed in Companion Case.

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[35]*See* Deposition of Theresa Rodgers at 108.

Additionally, female students voiced complaints against Mr. DeMarte in January, 1981; March, 1981; November, 1982 and October, 1985.[36] Dr. Smith and Mr. Miller had direct notice of all these complaints. Mr. Shuey was informed of at least two of the above noted complaints. *See* Defendants, Second Supplemental Brief Submitted in Companion Case at 4. The personnel file of Mr. DeMarte is silent as to these incidents. Furthermore, it is not clear what, if any, disciplinary action was taken against the teacher. Significantly, Mr. DeMarte is still coaching the girls, tennis team.

The next critical series of events, upon which liability of the School District is based, occurred in the fall of 1979. At that time, Judy Grove, a high senior and member of the band, reported to Mr. Miller and Dr. Smith that the band director, Edward Wright, had sexually assaulted her.[37]

It will fall to a jury to ascertain the exact sequence of events that immediately preceded and followed Judy

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[36]As conveyed to the administration, Mr. DeMarte attempted to molest a young woman during Homecoming activities. Both Dr. Smith and Mr. Miller received notice of the complaint.

[37]Mr. Miller testified that, prior to talking co Judy, he had received a phone call from Mr. Wright informing him about the "rumors" involving Ms. Grove. Apparently, Mr. Wright was seeking advise on how to quiet the rumors. *See* Deposition of Mr. Miller at 55-56.

Grove's disclosure. A review of the deposition testimony of Frederick Smith, Richard Miller, Judy Grove, and her father, Hayward Grove, demonstrates a great divergence of views. However, for purposes of summary judgment, the evidence must be viewed in the light most favorable to the non-moving party. Additionally, the Court must consider reasonable inferences that might be drawn in favor of the plaintiff. Since the testimony of Judy Grove is most favorable to the plaintiff, the Court will review that testimony in some detail.[38]

Although Ms. Grove's recollections, regarding specific dates and times, were somewhat vague, her deposition testimony was rather emphatic on other points. Judy Grove testified that she relayed the incident of the sexual assault to both Mr. Miller and Dr. Smith.[39] According to her testimony, Dr. Smith implied that in light of the circumstances--Judy had been drinking on the evening of the assault--she was responsible for the assault. Dr. Smith warned that she would not look good if the facts got out. Judy reports that she was frightened and felt as though

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[38]Despite defendants, characterization of Ms. Grove's testimony, as "ridiculous," "preposterous" and "incredible," *see* Defendants Supplemental Brief Submitted in Companion Case at 4, 9, the Court accepts the testimony as plausible.

[39]Mr. Shuey was apprised of the incident involving Judy Grove and Edward Wright by both Mr. Miller and Dr. Smith. *See* Deposition of Mr. Shuey at 17-22.

she was receiving no support from the Administrators. It was only after being threatened with public disclosure and personal humiliation that Judy retracted, in a rather flippant fashion, that the assault had occurred.[40]

Sometime after these initial meetings, Judy's father requested a conference. Prior to inviting Judy into the conference, Mr. Miller and Dr. Smith talked with Mr. Grove. Mr. Grove testified that an effort was made to convince him that no teacher would behave in the fashion alleged by Judy. *See* Deposition of Hayward Grove at 36,

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[40]Q: He, [Dr. Smith] told you it was your fault, or is that the impression you had?

A: No. He said it was my fault. That's why he wanted to clear up the rumors because he wanted the band to get back on their feet again.

Q: Did you tell him during that conversation that the rumors were not correct?

A: He had told me that if the rumors were true I would be--I could find myself in front of a jury, in front of a judge, telling exactly what happened, that being that I had been drinking [and that I was] at his house voluntarily, I would look like--I wouldn't look very good, is what he said. At that point I said, "Forget it. It's not true."

Q: So whatever the reason, you did tell Dr. Smith that these rumors were not true--

A: He told me that my parents would be called; he would call my father down and my mother right then. I said, "Forget it. I don't want to go through with it." You know. "Just forget it.". . . . " If I have to go through all of this they're not true."

Deposition of Judy Grove at 46-47 (September 12, 1986).

41. Although when Mr. Grove entered the meeting he was confident that his daughter's version of the facts were true, he admitted to being less certain after conferring with these Administrators. *Id.*[41]

One of the topics of discussion at the above mentioned conference was whether Judy would be able to remain in the band. As perceived by both Judy and her father she had a choice: recant her story in front of the assembled band or withdraw from all band activities. *See* Deposition of Judy Grove at 59-60, 68; Deposition of Hayward Grove at 44, 47, 49. As recalled by Judy, the suggestion to appear before the band and dispel the "rumors," about Mr. Wright, originated with Dr. Smith. *See* Deposition of Judy Grove at 74 (September 12, 1986).

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[41]Another critical fact relates to Judy's deliberate attempt to seek help from Gene Dillard, an independent alcohol and drug counsellor. Mr. Dillard spent time at the Bradford Area High School in September, 1979. At the conclusion of all group informational sessions, Mr. Dillard invited students to talk with him individually. Judy Grove seized that opportunity and confided in Mr. Dillard.

As set forth in his deposition testimony, Judy told Mr. Dillard that she had been sexually assaulted by Mr. Wright. With the express consent of Judy, this information was directly relayed to Dr. Smith and Mr. Miller. Mr. Dillard offered his opinion that other students had probable been subject to Wright's abuses. The Administrators assured Mr. Dillard that the matter would be taken care of.

In early January, 1980, Dr. Smith assembled all the band members.[42] He proceeded to acknowledge that rumors had been circulating and that a certain student would address those rumors. The floor was turned over to Judy. As recalled by Judy, pressed with questions by her peers, she fled the room in tears. It is not clear whether an apology was ever actually offered.

The episode of the forced apology has special significance in light of the assaultive conduct that occurred between Edward Wright and Kathleen Stoneking. Apparently, the "forced apology" served as a trump card in the hands of Edward Wright. When a student would threaten to disclose the abuse, Wright quickly reminded his victim about the "Judy Grove incident." His message was clear and convincing: "No one believed Judy Grove, why would anyone believe you." *See infra* Note 17. His tactical threat proved to be quite effective at least for a period of time.

In reviewing the above events, for the purpose of evaluating the liability of the School District, this Court need not decide whether the School District had a practice or custom, of dealing with complaints of sexual abuse or harassment, which "caused" the plaintiff's injuries. Nor is

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[42]At, or about the same time, Dr. Smith directed Mr. Wright to cease all one-on-one contact with female students. The enforcement of this directive was left solely up to Mr. Wright.

it for this Court to determine whether Dr. Smith, Mr. Miller and Mr. Shuey are liable in their official capacities, such that liability could be imputed to the School District. *See Brandon*. 469 U.S. 464. Rather, this Court is charged with the task of evaluating the record evidence and determining whether genuine issues of material facts exist. The ultimate issue of liability is one with which the jury must wrestle.

For the purposes of this motion, the Court concludes that there is sufficient evidence from which a jury could infer the existence of a practice or custom. Additionally, it could be inferred from the evidence that the School District was responsible for the practice or custom and that the practice or custom caused the plaintiff's injuries. Thus, the defendants, motion, as it pertains to the liability of the School District, must be denied.

C. Qualified Immunity

The standard to be applied in resolving a qualified immunity issue is well-settled. In *Harlow v. Fitzgerald*, 457 U.S. 800, (1982), the Supreme Court revised the qualified immunity standard and held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights, of which a reasonable person would have known." *Id.* at 818. Thus, the pending question, in terms of the qualified immunity defense, is whether the plaintiff

had a constitutional right which at the time of the alleged violation, was clearly established.

As the Court concluded in Section IV B (1) of this opinion, the plaintiff has alleged a viable claim of a constitutional violation. According to the Court's conclusion, there is a special relationship that existed between the plaintiff and the individual defendants. As a result of this relationship defendants had a duty to provide a reasonably safe environment for the plaintiff. There is nothing new or novel about this constitutional right or this duty. *See. e.g., Ingraham v. Wright*, 430 U.S. 651 (1977); *Martinez v. California*, 444 U.S. 277 (1980); *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974); *Withers v. Levine*, 615 F.2d 158 (4th Cir. 1980); Doe I, 649 F.2d 134 (2d Cir. 1981); *Stokes v. Delcambre*, 710 F.2d 1120 (5th Cir. 1983).

This Court concludes that a reasonable person would have been aware that the plaintiff had a substantive due process right to be free from intrusions into her "personal privacy and bodily integrity." As the court in *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980) so aptly stated:

> [t]he existence of this right to ultimate bodily security--the most fundamental aspect of personal privacy--is unmistakably established in our constitutional decisions as an attribute of the ordered liberty that is the concern of substantive due process. Numerous cases in a variety of contexts recognize it as the last line of de-

> fense against those literally outrageous abuses of official power whose very variety makes formulation of a more precise standard impossible. Clearly recognized in persons charged with or suspected of crime and in the custody of police officers, we simply do not see how we can fail also to recognize it in public school teachers.

Id. at 613. Thus, defendants are not entitled to qualified immunity.

D. Pendent State Claims

Since the Court denied the defendant's motion for summary judgment, as it pertained to the plaintiff's § 1983 claims, this Court retains subject matter jurisdiction over the pendent state claims. See *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

The only remaining question is whether the complaint sets forth state law claims. The plaintiff's complaint does not identify a specific state law cause of action;[43] the

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[43]Reference in the complaint to 42 Pa. C.S.A. § 8550 appears to be offered only as a means of demonstrating that the doctrine of "official immunity" may fail to shield these defendants from suit.

In part, 42 Pa. C.S.A. § 8550 provides:

> In any action against a local agency or employee thereof nor damages on account of an injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the

pleadings are not sufficient to give notice of the claim alleged. Thus, this Court concludes that the motion for summary judgment, as it pertains to the state law claims set forth in Counts II, IV and VI, is granted.

An appropriate order shall be issued.

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injury and that such act constituted a crime, actual fraud, actual malice or willful misconduct, the provisions of the sections 8545 (relating to official liability generally), 8546 (relating to defense of official immunity), 8548 (relating to indemnity) and 8549 (relating to limitation on damages) shall not apply.

ORDER

MENCER, J.

AND NOW, this 28th day of August, 1987, for the reasons set forth in the accompanying Opinion,

IT IS HEREBY ORDERED that:

(1) the Motion for Summary Judgment, filed on behalf of the Defendants, Bradford Area School District, Frederick Smith, Richard Miller and Frederick Shuey, is DENIED as the Motion relates to Counts I, III, V and VII of the Complaint;

(2) the Motion for Summary Judgment, filed on behalf of the defendants, is GRANTED as it pertains to Counts II, IV and VI of the Complaint.

Judgment is entered in favor of the Defendants and against the Plaintiff, Kathleen Stoneking, on Count II, Count IV and Count VI of the Complaint.

IT IS FURTHER ORDERED that the Defendants shall file a Pretrial Narrative Statement by September 18, 1987. The trial, scheduled for September 8, 1987, is continued. A Pretrial Conference shall be held on Wednesday, October 7, 1987, at 4:00 pm in Room 310, United States Courthouse, Erie, Pennsylvania.

I. Opinion of U.S. Court of Appeals for Third Circuit, No. 87-3637, September 12, 1988

Stoneking v. Bradford Area School District, et al.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 87-3637

KATHLEEN STONEKING

v.

BRADFORD AREA SCHOOL DISTRICT, FREDERICK SMITH, in his individual and official capacity as principal of the Bradford Area High School; RICHARD MILLER, in his individual and official capacity as assistant principal of the Bradford Area High School; and FREDERICK SHUEY, in his individual and official capacity as Superintendent of the Bradford Area School District,

Frederick Smith, Richard Miller and Frederick Shuey,

Appellants

On Appeal from the United States District Court for the Western District of Pennsylvania (ERIE)
(D.C. Civil No. 87-00063 E)

Argued February 3, 1988

Before: SLOVITER, STAPLETON, and MANSMANN, *Circuit Judges*

(Filed September 12, 1988)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

I.

Facts

This is an appeal by the individual defendants from the district court's order denying their motion for summary judgment on the grounds of qualified immunity in an action brought under 42 U.S.C. § 1983 (1982). We have jurisdiction of this appeal under 28 U.S.C. § 1291 (1982). *See Mitchell v. Forsyth*, 472 U.S 511, 530 (1985); *Hynson v. City of Chester*, 827 F.2d 932, 933 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 702 (1988). Our review of a grant or denial of summary judgment is plenary and, like the district court, we must view the facts in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby*,

Inc., 477 U.S. 242, 255 (1986); *see also Hynson*, 827 F.2d at 933.

In *Mitchell*, the Supreme Court stated that "a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." 472 U.S. at 526. Defendants agree that in this case we need look only at the pleadings. Appellants' Brief at 5. We turn, therefore, to the allegations of the complaint.

Kathleen Stoneking, during the relevant period a student at the Bradford Area High School, brought this action against the Bradford Area School District, Frederick Smith, the principal of the Bradford Area High School, Richard Miller, the assistant principal, and Frederick Shuey, the superintendent of the Bradford Area School District.

She alleges that the School District hired Edward Wright to serve as its band director in 1976; that during Wright's tenure as band director the band won numerous competitions and Wright enjoyed strong support and backing of the School District and its officials; that a female member of the band informed Principal Smith in 1979 that Wright had attempted to rape and/or sexually assault her but that Smith failed to conduct an investigation or report the allegations to appropriate authorities and instead required the student to issue a public apology to Wright and retract her allegations; that Smith instructed Wright to have no further "one on one" contact with female band members; that plaintiff Stoneking participated in the band during her sophomore, junior and senior years until her graduation in 1983; and that beginning in October 1980 and continuing thereafter until May of 1985, Wright, through physical force, threats of reprisal, intimidation and coercion, sexually abused Stoneking, harassed her, and forced her to engage in various sexual acts with him at various places, including the high school's band room and its

environs, Wright's vehicle and house, and on trips for band functions. The complaint also alleges that in March 1986 Wright resigned after a psychologist reported a complaint concerning Wright's sexual abuse of another female band member, and that he was thereafter prosecuted criminally for various sex-related crimes.

Stoneking pleads that there was a special custodial relationship between herself and the defendants, that Smith and Miller had actual notice of the allegations of Wright's sexual misconduct and that Shuey either knew or recklessly failed to discover that Wright was sexually abusing female band members. She alleges that the defendants were intentionally, recklessly and deliberately indifferent to the health, safety and welfare of the female student body in general and the plaintiff in particular in that they failed to report the various incidents of suspected sexual abuse of female band members by Wright; failed to adopt an effective policy or policies to prevent the sexual abuse of female students and to promptly report complaints of such abuse to appropriate authorities; failed to properly and vigorously investigate reports of sexual abuse by Wright of female band members; concealed from parents of female band members and public officials the various complaints and accusations that had been made against Wright since 1979; continued to permit Wright to function as band director despite actual notice that he presented a significant threat; and encouraged and perpetuated the custom and course of conduct at the high school whereby allegations of sexual abuse or mistreatment by Wright and other teachers were not investigated and reported. Stoneking alleges that as a result she suffered severe psychological trauma, including severe depression, loss of self-esteem, mental anguish, embarrassment and humiliation, and she seeks compensatory and punitive damages.

In their answer,[1] defendants deny most of the allegations directed to liability but admit that in 1979 Smith questioned a female band member regarding a possible relationship with Wright, allege that the student denied the relationship and said she had fabricated the story, admit that in 1984 Smith directed Wright not to place himself in a one-on-one situation with female students, admit that Superintendent Shuey was advised of the actions taken by Smith with respect to Wright, and admit that Smith had a chronological miscellaneous file with notations concerning matters raised about Wright.

Following some discovery, defendants moved for summary judgment on the ground, *inter alia*, of qualified immunity.[2] They contended that "no clearly settled law existed, either at the time of the incidents complained of in the plaintiff's Complaint or as of the present time, which would cause a reasonable person to know either of the constitutional right which allegedly has been violated or that the alleged acts or failure to act on the part of the individual defendants

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1. Defendants filed their answer after the court denied their motion to dismiss raising, *inter alia*, qualified immunity as a defense.

2. The defendants also asserted that Stoneking's federal claim was barred by the applicable statute of limitations, that Stoneking had not established a violation of her constitutional rights, and that she had failed to state a cause of action under either section 1983 or state law. The district court denied the motion as it pertained to the federal claim, but granted it as to the state law claim, stating that "the pleadings are not sufficient to give notice of the claim alleged." Stoneking v. Bradford Area School Dist., 667 F. Supp. 1088, 1103 (W.D. Pa. 1987). The district court later certified its order as it related to the statute of limitations issue for interlocutory appeal and continued the trial of the case pending appeal. By an order dated October 13, 1987, this court denied defendants' petition for permission to appeal the district court's ruling on the statute of limitations issue. Stoneking v. Bradford Area School Dist., No. 87-8061 (3d Cir. Oct. 13, 1987).

would lead to a violation of that constitutional right." Defendants' Motion for Summary Judgment, *Rovito v. Bradford Area School Dist.*, No. 86-133 (W.D. Pa.) (filed April 10, 1987).[3]

The court denied summary judgment on the qualified immunity ground. *Stoneking v. Bradford Area School Dist.*, 667 F. Supp. 1088, 1102 (W.D. Pa. 1987). In its opinion, the court referred to evidence submitted in the cases with which this action was consolidated, *see supra* note 3,[4] including the affidavit of Dr. Chet C. Kent, Superintendent of Keystone Oaks School District, which stated that the policies adopted by the defendants for dealing with suspected cases of sexual assault or sexual harassment deviated significantly from the norm. 677 F. Supp. at 1097-98. The court held that plaintiff had alleged violation of a clearly established constitutional right and that there was evidence by which a jury could conclude that defendants were reckless in their handling of the 1979 incident which involved Judy Grove,[5] in their failure to

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3. Defendants' motions incorporated by reference their comparable motions filed in similar actions filed by two other Bradford Area High School students, Kim Harbaugh and Lisa Rovito, who allege that they were sexually abused by Wright and assert liability on the same basis as does Stoneking. Prior to ruling on the summary judgment motion, the district court consolidated Stoneking's actions for trial with those of Harbaugh and Rovito. *See* 667 F. Supp. at 1089 n.1.

4. In response to an order entered by this court on June 20, 1988, the district court entered an order on July 7, 1988 supplementing the Stoneking record with the materials submitted in the *Harbaugh* and *Rovito* cases.

5. There is evidence that in the fall of 1979, Judy Grove, a female band member, complained to Smith and Miller that Wright had sexually assaulted her, that Grove's complaint was confirmed to Smith and Miller both by Grove's father and by an independent student counselor and that Smith and Miller responded by presenting Grove with the choice of either withdrawing from the

investigate other reported incidents involving Wright and female students,[6] and in their attempts to remedy and/or rectify the problems involving Wright.[7] The court held that in light of the above, the issue of liability is one for the jury to decide.

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band or publicly recanting her story. Grove testified that in 1979, Smith instituted a policy whereby Wright was forbidden from having one-on-one contact with any female student. Defendants' answer admits that Shuey had knowledge of the 1979 Grove incident. Dr. Chet C. Kent opines that the handling of the Grove incident was "so far below the minimum accepted and generally prevailing administrative standard that [it] constituted deliberate or recklessly indifferent conduct . . . ." Affidavit of Chet C. Kent, submitted by Kim Harbaugh in response to Defendants' Motion for Summary Judgment (hereinafter Kent Affidavit) at 17.

6. There is evidence that, for example, in 1984, the year following Stoneking's graduation from the Bradford Area High School, another female band member complained to Smith that she was being sexually abused by Wright. In response, Smith reiterated the no one-on-one policy between Wright and female students that he had instituted in connection with the Grove incident, and told Wright not to discuss the incident with anyone. Smith also informed Shuey of the student's complaint and of the actions that he had taken in response. Kent concludes that in view of the fact that neither Smith nor Shuey investigated the complaint, informed the student's parents, called the child abuse hot line, or disciplined Wright in any way, "their behavior demonstrates deliberate or reckless indifference and callous disregard for [the student's] safety." Kent Affidavit at 18.

The factual nature of the evidence before the court, *see also supra* note 5 and *infra* note 7, thus distinguishes this case from that of Scott v. Willis, 543 A.2d 165 (Pa. Commw. Ct. 1988), on which defendants rely, where the court stated that "in the case at bar, Appellants have not pled any *facts* to suggest that any of the Appellees had notice of [the teacher's] dangerous proclivities." *Id.* at 171 (emphasis in original).

7. The records in the companion cases are replete with evidence of instances of students' complaints to one or more of the defendants of sexual misconduct by various teachers at the

Although, as we noted above, ordinarily qualified immunity can be determined on the basis of the pleadings, the Supreme Court has recognized, as do our cases, that there may be instances in which discovery may be necessary before a motion for summary judgment on qualified immunity grounds can be resolved. *See Anderson v. Creighton*, 107 S. Ct. 3034, 3042 n.6 (1987); *see also Brown v. United States*, 851 F.2d 615, 617 (1988) (record insufficiently developed on qualified immunity issue); *Kovats v. Rutgers*, 822 F.2d 1303, 1313 (3d Cir. 1987) (legal issues on the qualified immunity question "inextricably intertwined" with the factual issue requiring discovery before determination of qualified immunity issue).

Bradford Area High School. These included a female student's complaint in 1978 that a teacher had made sexual advances to her while she was alone with him in his classroom correcting papers, to which Smith responded by telling her that it would be her word against the teacher's and warning her not to tell her parents; a female student's complaint in January 1981 that the same teacher had kissed her on the neck; another student's complaint in March 1981 that the same teacher had blindfolded her in a sensitivity test and then gotten down on his hands and knees and looked up her dress; another student's complaint in November 1982 that the teacher had asked her to sit on his lap during a party; and a 1985 complaint from the father of a female student that the teacher had placed his hands on his daughter's body. Other incidents included that of a different teacher's having written a suggestive note to a student, and another teacher having had an affair with a student. There is no evidence that defendants investigated or reported any of these complaints, leading Dr. Kent to conclude that, at least as to defendants Smith and Shuey, their behavior "encouraged a climate to flourish where innocent girls were victimized," Kent Affidavit at 20, and that, had Smith and Shuey taken appropriate steps, "Wright would have been prevented from preying on other female band members and a safe school environment would have been created for all girls." Kent Affidavit at 22.

In this case, however, defendants are content to stand on the pleadings. The basis for their claim of immunity was that Stoneking did not have a clearly established right to be free from the sexual abuse of Wright, a member of the school's staff, that they were under no clearly established duty to protect her, and that, in any event, they could not reasonably have known that their conduct might violate any of Stoneking's constitutional rights. Because this argument is premised on the assumption that the facts alleged by Stoneking in her complaint are true, we can evaluate the district court's denial of summary judgment on the qualified immunity issue without consideration of the facts adduced on summary judgment, and refer to those facts only to the extent that they amplify the allegations of the complaint.

II.

Qualified Immunity

The doctrine of qualified immunity entitles government officials performing discretionary functions to immunity from liability for civil damages when their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The question before us is whether reasonable school officials in the position of defendants and with the information then available to them should have known that their alleged actions or omissions were unlawful. *See Anderson v. Creighton*, 107 S. Ct. 3034, 3040 (1987) (qualified immunity issue is whether "a reasonable officer could have believed [the] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed").

In this case, where all parties agree that the existence of qualified immunity may be determined

from the pleadings, we need not be concerned with any issue relating to the burden of proof, but rather only with an objective, legal determination of whether the rights alleged were clearly established. *See Harlow*, 457 U.S. at 818-19. *See generally* S. Nahmod, *Civil Rights and Civil Liberties Litigation* § 8.16, at 511 (2d ed. 1986) ("As to the question of the existence of clearly settled law, to speak of a burden of proof with its evidentiary emphasis appears misplaced. . . . [W]hether clearly settled law existed at the time a defendant acted is an issue of law for the court.").

The Supreme Court has recently offered guidance as to what is meant by a "clearly established right," explaining that,

> [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of preexisting law the unlawfulness must be apparent.

Anderson, 107 S. Ct. at 3039 (citations omitted). *Anderson* thus supports our precedent interpreting the "clearly established" standard as "requiring some but not precise factual correspondence [between the relevant precedents and the conduct at issue] and demanding that officials apply general, well developed legal principles." *People of Three Mile Island v. Nuclear Regulatory Commissioners*, 747 F.2d 139, 144 (3d Cir. 1984); *accord Kovats v. Rutgers*, 822 F.2d 1303, 1313 (3d Cir. 1987).

The right that Stoneking alleges defendants violated is her "liberty interest to be free in her person from threats, intimidation and sexual abuse as that perpetrated by Wright." App. at 13. Substantial

authority supports the district court's holding that a student has a liberty interest in being free from physical abuse in school. As the court stated in *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980), a case involving corporal punishment of a student at school,

> [t]he existence of this right to ultimate bodily security -- the most fundamental aspect of personal privacy -- is unmistakably established in our constitutional decisions as an attribute of the ordered liberty that is the concern of substantive due process. Numerous cases in a variety of contexts recognize it as a last line of defense against those literally outrageous abuses of official power whose very variety makes formulation of a more precise standard impossible.

This right was established no later than 1977, when the Supreme Court in *Ingraham v. Wright* held that "corporal punishment in public schools implicates a constitutionally protected liberty interest." 430 U.S. 651, 672 (1977); *see also Garcia v. Miera*, 817 F.2d 650, 656-58 (10th Cir. 1987) (law clearly established by 1982 that excessive corporal punishment could violate student's substantive due process rights), *cert. denied*, 108 S. Ct. 1220 (1988); *cf. Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) (constitutionally protected liberty interest of persons confined in mental institution to safe environment); *Milonas v. Williams*, 691 F.2d 931, 942-43 (10th Cir. 1982) (due process rights of children in quasi-juvenile detention facility violated by certain physically abusive disciplinary practices), *cert. denied*, 460 U.S. 1069 (1983); *Spence v. Staras*, 507 F.2d 554, 557 (7th Cir. 1974) (constitutional right of persons confined in mental hospital to be free from physical assault by other patients).

Defendants' attempt to distinguish these cases on the grounds that they involved physical, rather than sexual abuse, is unpersuasive. The right at issue is that of personal bodily integrity.[8] We agree with the district court that "common sense suggests that the right to be free from sexual abuse is at least as fundamental as the right to be free from the less intrusive physical abuse of paddling." *Stoneking*, 667 F. Supp. at 1094. We therefore hold that Stoneking had a constitutionally protected right to be free from sexual abuse by her school teachers that was clearly established by 1979, when defendants were put on notice of Wright's alleged abuse of a female student.

In fact, defendants at oral argument conceded that the sexual abuse of Stoneking by Wright was a "constitutional tort," derogating by this concession from their argument that Stoneking had no liberty interest protected by the substantive component of the due process clause. Instead, their argument is that they, in their capacity as school administrators, did not have at the relevant time, and indeed do not now have, a "clearly established" affirmative duty to take steps to protect school children from sexual abuse by a third party, including a staff member. They seek to distinguish the Supreme Court cases delineating state officials' obligation to take affirmative steps to protect a victim of violence on the ground that they arose in a custodial situation, and argue that school administrators do not have the type of special relationship with school children recognized by the law that imposed on them a duty to act in such situations.[9]

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8. In her deposition Stoneking testified that Wright fondled and kissed her breasts, inserted his fingers into her vagina, exposed himself to her and forced her to handle his genitals, and occasionally compelled her to have oral sex with him. Stoneking Deposition II at 341-44, 351-52.

9. This aspect of defendants' qualified immunity argument is properly before us on this appeal. As we held in Chinchello v.

Defendants' argument that they had no legal duty to Stoneking is based on cases such as *Martinez v. California*, 444 U.S. 277 (1980), where the Court affirmed the dismissal on proximate cause grounds of a suit against state officials who had paroled a dangerous felon seeking damages for the felon's torture and murder of a fifteen-year old girl five months after his release. The Court explained that, "[t]he parole board was not aware that [plaintiffs'] decedent, as distinguished from the public at large, faced any special danger." *Id.* at 285. Following *Martinez*, this court also held that county officials could not be held liable for the murders of residents in a nearby community committed by an escaped county prisoner. *Commonwealth Bank & Trust Co. v. Russell*, 825 F.2d 12 (3d Cir. 1987).

These cases do not hold, however, that state officials can never be liable for harm committed by a third party. In fact, the Court in *Martinez* cautioned that "[w]e need not and do not decide that a parole officer could never be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole." 444 U.S. at 285 (footnote omitted). In *Russell*, we stated that "[i]t is clear . . . that § 1983 is not limited to cases of direct harm inflicted by state officials. This is suggested by the distinction made in *Martinez* between that victim there and those who the authorities knew face a 'special danger.'" 825 F.2d at 16.

It is incontestable that custodians have some duty to protect those in their custody from physical abuse by

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Fenton, 805 F.2d 126, 131 (3d Cir. 1986), the "absence of a clearly established legal duty . . . can accurately be described as a contention that [defendant] violated no clearly established legal norm" and "treating [that contention] in this manner will best serve the objectives of *Mitchell*." Of course, this contention must be distinguished from the "I didn't do it" defense, of which we cannot take cognizance at this stage. *Id.*

third persons. *See Youngberg*, 457 U.S. at 324 ("state . . . has the unquestioned duty to provide reasonable safety for all residents . . . within the institution [for the mentally retarded]"); *see also Spence*, 507 F.2d at 557; *cf. Estelle v. Gamble*, 429 U.S. 97 (1976) (Eighth Amendment right of prisoner to be provided with adequate medical treatment). Cases after *Martinez* have held that such a duty is not limited to the custodial relationship. Thus, in *Estate of Bailey by Oare v. County of York*, 768 F.2d 503 (3d Cir. 1985), we held that if a state social services agency is aware that a particular child has been abused, a special relationship arises that creates an affirmative duty on the part of the state agency to protect that child from further abuse. *See Wood v. Ostrander*, 851 F.2d 1212, 1218 (1988) (law clearly established that police officer has duty under section 1983 not to abandon passengers of arrested drivers thereby exposing them to unreasonable danger); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (in banc) (holding that "a child involuntarily placed in a foster home is in a situation so analogous to a prisoner in a penal institution and a child confined in a mental health facility that the foster child may bring a section 1983 action [against the foster care agency] for violation of fourteenth amendment rights [for failure to protect foster children from abuse]"); *Doe v. New York City Department of Social Services*, 649 F.2d 134, 145-46 (2d Cir. 1981) (state foster care agency has an affirmative duty to protect a child from physical and/or sexual abuse inflicted by the child's foster parents); *White v. Rochford*, 592 F.2d 381, 383-86 & n.6 (7th Cir. 1979) (allegations that police officers, after arresting an adult driver, left the children passengers alone in the car on a busy highway in cold weather stated a claim under the Fourteenth Amendment); *Doe "A" v. Special School Dist.*, 637 F. Supp. 1138, 1143-45 (E.D. Mo. 1986)

(substantive due process right of school children not to be sexually abused by school bus driver); *see also Jensen v. Conrad*, 747 F.2d 185, 194 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985). *Contra Harpole v. Arkansas Dep't of Human Services*, 820 F.2d 932 (8th Cir. 1987); *DeShaney v. Winnebago County Department of Social Services*, 812 F.2d 298 (7th Cir. 1987), *cert. granted*, 108 S. Ct. 1218 (1988).

Stoneking's relationship vis-a-vis her school's principal, assistant principal, and even school district superintendent, is patently not comparable to that of an unidentified "member of the general public, living in the free society, and having no special custodial or *other* relationship" with state parole officers who released a parolee. *See Fox v. Custis*, 712 F.2d 84, 88 (4th Cir. 1983). Although she was not in a technical sense in defendants' legal "custody," as was the child in *Bailey* and *Taylor*, she was a member of a known and identifiable class of potential victims -- female students in general, and female band members in particular.

Under Pennsylvania law Stoneking was required to attend school. *See* 24 Pa. Stat. Ann. § 13-1327 (Purdon Supp. 1988); *see also* 24 Pa. Stat. Ann. § 13-1333 (Purdon Supp. 1988) (imposing penalty of fine and/or jail on parents and guardians who violate compulsory education statute). Because students are placed in school at the command of the state and are not free to decline to attend, students are in what may be viewed as functional custody of the school authorities, at least at the time they are present.

It is abundantly clear that "the state has expressly stated its desire to provide affirmative protection" to students. *See Bailey*, 768 F.2d at 509; *see also Jensen*, 747 F.2d at 194-95 n.11. The Pennsylvania Child Protective Services law, 11 Pa. Stat. Ann. § 2202 *et seq.*, provides that "school administrator[s]" are mandated to report suspected child abuse, 11 Pa. Stat.

Ann. § 2204(c) (Purdon Supp. 1988). Even if they were under no statutory duty to report suspected instances of sexual assault perpetrated by teachers, as opposed to that inflicted by parents and other "person[s] responsible for the child's welfare," *see Pennsylvania State Educ. Assoc. v. Department of Public Welfare*, 68 Pa. Commw. 279, 449 A.2d 89 (1982), the Act reflects the state's broad policy "to encourage more complete reporting of suspected child abuse and . . . [to] provid[e] protection for children from further abuse," 11 Pa. Stat. Ann. § 2202 (Purdon Supp. 1988). *See generally*, Beaty & Woolley, *Child Molesters Need Not Apply: A History of Pennsylvania's Child Protective Services Law and Legislative Efforts to Prevent the Hiring of Abusers by Child Care Agencies*, 89 Dick. L. Rev. 669 (1985).

Moreover, Pennsylvania law has since 1911 explicitly vested school officials with authority *in loco parentis* over students. *See* 24 Pa. Stat. Ann. § 13-1317 (Purdon Supp. 1988);[10] *cf. New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985) ("[t]oday's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies"). The importance that Pennsylvania attaches to the educational process is apparent from its very Constitution, which provides "for the maintenance

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10. 24 Pa. Stat. Ann. § 13-1317 provides:

> Every teacher, vice principal and principal in the public schools shall have the right to exercise the same authority as to conduct and behavior over the pupils attending his school, during the time they are in attendance, including the time required in going to and from their homes, as the parents, guardians or persons in parental relation to such pupils may exercise over them.

and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." Pa. Const. art. 3, § 14. Indeed, the statute permitting termination of a teacher's contract for, *inter alia*, "immorality", *see* 24 Pa. Stat. Ann. § 11-1122 (Purdon 1962), was construed to cover termination of a teacher who had proposed spanking two female high school students in a manner which the students perceived as sexual in nature. *See Penn-Delco School Dist. v. Urso*, 33 Pa. Commw. 501, 382 A.2d 162 (1978).

Even if there were no other Pennsylvania statutes explicitly directed to the obligation of school administrators to protect school children,[11] the duty owed by a school official to protect students from the tortious or criminal conduct of teachers has long been established in the common law.[12] *See* W. Keeton, *Prosser and Keeton on the Law of Torts*, § 56, at 383 (5th ed. 1984); *see, e.g., Wagenblast v. Odessa School District*, 110 Wash.2d 845, 758 P.2d 968 (1988) (public school may not condition participation in interscholastic athletics on students releasing school district from all potential negligence claims because, *inter alia*, "school district owes a duty to its students to employ ordinary care and to anticipate reasonably foreseeable dangers so as to take precautions for

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11. A Pennsylvania statute effective January 1, 1986 provides that prospective school employees who have direct contact with children may not be hired if they have been convicted of, *inter alia*, statutory rape, indecent assault, sexual abuse of children, and corruption of minors within the preceding five years. 24 Pa. Stat. Ann. § 1-111 (Purdon Supp. 1988).

12. Although a state law duty is not equivalent to a constitutional duty, *see* Archie v. City of Racine, 847 F.2d 1211, 1216-19 (7th Cir. 1988), that body of law may be instructive as to the duty owed. *See, e.g.*, Doe v. New York City Dep't of Social Services, 649 F.2d at 145-46.

protecting the children in its custody from such dangers"); *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238, 1243-44 (1986) (school district may be held liable for its negligence arising out of teacher's sexual assault of students); *Galli v. Kirkeby*, 398 Mich. 527, 248 N.W.2d 149, 152 (1976) (school board may be liable, under theory of respondeat superior, for principal's homosexual assaults on a student); *Schultz v. Gould Academy*, 332 A.2d 368, 370-71 (Me. 1975) (boarding school liable when intruder gains access to dormitory room and criminally assaults female student).

As embodied in the Restatement (Second) of Torts § 320 (1965), expressly made applicable to school officials in comment a,

> [o]ne who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor
>
> (a) knows or has reason to know that he has the ability to control the conduct of the third persons, and
>
> (b) knows or should know of the necessity and opportunity for exercising such control.

See also id. § 315 (duty may arise where "(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third party's conduct, or (b) a special relation exists between the actor and the other which gives the other a right to protection").

While Pennsylvania school officials, like its other government officials, enjoy a broad statutory immunity,[13] the fact that defendants may be immune under state law does not detract from the existence of a common law duty, nor does it alter their potential liability under section 1983. *See Wade v. City of Pittsburgh*, 765 F 2d 405, 407-08 (3d Cir. 1985).

There is thus an adequate basis from the Pennsylvania child abuse reporting and *in loco parentis* statutes, coupled with the broad common law duty owed by school officials to students, to conclude there was a desire on the part of the state to provide affirmative protection to students.

It follows that if, as we must assume from the complaint, the defendants knew, or should have known, at least as early as 1979 from the Grove incident, of Wright's sexual misconduct with a female band student, they were on notice that female band members faced a "special danger." *See Martinez*, 444 U.S. at 285. In these circumstances, defendant school officials had a constitutional duty to investigate and take reasonable steps to protect the students. Defendants stated at oral argument that they had a duty to investigate the complaints but not a duty to protect the students. The distinction is meaningless,

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13. *See* 42 Pa. Cons. Stat. Ann. §§ 8541, 8542 (Purdon 1982). *See generally* Note, *Judicial Clarification of a Common Law Doctrine: the Pennsylvania Doctrine of Official Immunity*, 84 Dick. L. Rev. 473 (1980). Pennsylvania courts interpret the immunity statute broadly, and the exceptions thereto narrowly. *See* City of Philadelphia v. Love, 98 Pa. Commw. 138, 509 A.2d 1388 (1986), *appeal granted*, 514 Pa. 644, 523 A.2d 1132 (1987); *see also* Scott v. Willis, 543 A.2d 165 (Pa. Commw. Ct. 1988) (affirming dismissal of plaintiff's complaint against school officials arising out of their failure to protect young school children from teacher's sexual assault on grounds that plaintiff failed to plead sufficient factual or legal predicate to establish willful misconduct exception to governmental immunity, 42 Pa. Cons. Stat. Ann. § 8550 (Purdon 1982)).

because the duty to investigate must also encompass some duty to act based on the results of the investigation.

Even if we were to accept defendants' argument, which is unsupported by any court decision, that state officials have the affirmative duty to protect individuals "only in situations where individuals are helpless to protect themselves from harm and government officials in a position to prevent this harm are made aware of or have actually caused the individuals to be in a position where they are helpless to protect themselves," Appellant's Brief at 19, the allegations of the complaint satisfy this standard. Surely impressionable teenagers faced with sexual harassment by a school authority figure cannot be deemed the emotional equivalents of independent adults.

Defendants state that "the right asserted by [Stoneking] was not established in 1979 by clearly established law," Appellant's Brief at 11, but limit their argument on this issue to their contention that their response to the 1979 allegations was objectively appropriate. Even though they never expressly argue that many of the section 1983 cases which have expounded upon the special relationship which gives rise to a duty to protect from harm by third parties had not been decided in 1979, when defendants were put on notice of Wright's activities, *compare Jensen*, 747 F.2d at 194-95 (constitutional right of affirmative protection not clearly established until after 1980), we consider that argument and reject it.

We do so relying not only on section 1983 cases,[14] but also on the entrenched common law duty owed by a

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14. There was substantial authority by 1979 that state officials have a duty to protect institutionalized persons from self-injury or assault by fellow inmates and staff, *see, e.g.*, Goodman v. Parwatikar, 570 F.2d 801, 804 (8th Cir. 1978); Spence v. Staras,

school official to protect students from attacks by teachers. Furthermore, after *Ingraham v. Wright* was decided in 1977, every reasonable school official should have known that it was a breach of this duty knowingly to stand by and take no action to protect a student from a beating administered by a faculty member. Since, as we noted above, sexual abuse is at least as traumatic as physical abuse, it is implausible that by 1979 reasonable school officials would not have known that there was a duty to take some affirmative action to investigate and protect students from a teacher's sexual abuse of which they were made aware, and to take steps to eliminate rather than condone an atmosphere in which teachers could sexually harass students with impunity.

Finally, defendants argue that we cannot sustain the district court's order denying their defense of qualified immunity unless we find their direction to Wright in 1979 to avoid one-on-one contact with female students was objectively inadequate. We cannot reach this issue at this stage of the litigation because it goes

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507 F.2d 554, 557 (7th Cir. 1974), and holding that a prisoner has a constitutional right to a safe environment and that the prison officials have a corresponding duty to reasonably insure that safe environment to prisoners, *see, e.g.*, Estelle v. Gamble, 429 U.S. 97, 103-04 (1976) (obligation to provide medical treatment); Stokes v. Delcambre, 710 F.2d 1120 (5th Cir. 1983) (pretrial detainee's right to be protected from another inmate's physical and sexual abuse clear as of at least 1979); *see also* Davis v. Zahradnick, 600 F.2d 458 (4th Cir. 1979) (prisoner's right to be protected from beating by guard). Further, Stoneking did not graduate until 1983, by which time the legal principles were even more clearly established. *See* Youngberg v. Romeo, 457 U.S. 307 (1982); *cf.* Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (even in non-custodial situations, "if the state puts the man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much as active tortfeasor as if it had thrown him into a snake pit.")

to the merits of the plaintiff's section 1983 claim. It is thus akin to the "I didn't do it" defense which is not cognizable at this stage. *See Chinchello*, 805 F.2d at 131.

The ruling in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), that denial of qualified immunity claims will be immediately appealable has imposed on the courts of appeals the responsibility of drawing the elusive line between the existence of a "clearly established" right and the question whether the conduct at issue violated that right. In this case, there is an expert affidavit countering defendants' bald contention that their response to the allegations of misconduct fell within the parameters of their reasonable professional judgment.[15] This creates a fact issue which must be determined by the factfinder. We express no view either as to whether defendants' conduct rose to the level actionable under section 1983, *see Colburn v. Upper Darby Twp.*, 838 F.2d 663, 667-70 (3d Cir. 1988), or as to the reasonableness of defendants' conduct in this case.

III.

Conclusion

For the reasons expressed herein, we will affirm the order of the district court denying defendants summary judgment on qualified immunity grounds and remand for further proceedings consistent with this opinion.

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15. In *Youngberg*, 457 U.S. at 323 (footnote omitted), the Court held there would be liability only if defendants' conduct was "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that [they] actually did not base the decision on such a judgment."

STAPLETON, *Circuit Judge*, dissenting.

A school teacher, school administrator, or anyone else acting under color of state law clearly violates the Constitution if he or she sexually abuses a student. That principle is not helpful here, however, because this suit does not involve a claim against Wright. Accordingly, the court's opinion attempts to establish that school officials owe a "constitutional duty to investigate" any complaint regarding conduct, presumably by anyone, that might possibly pose a threat to the "personal bodily integrity" of school children within their jurisdiction and a resulting constitutional duty to protect from harm any child whom that investigation might have disclosed to be at risk. While I have substantial reservations about the soundness of this legal conclusion, this appeal provides no occasion to embrace or reject it. The appellants are entitled to immunity unless it should have been readily apparent to them based on the previously decided cases that their failure to do more about the 1979 complaint concerning Wright would violate the constitutional rights of one in Stoneking's position. The court has found no case from which its "constitutional duty to investigate" is "readily apparent" and that should be the end of the matter. Even assuming that the court's analysis is ultimately determined to have merit, the Supreme Court has made it crystal clear that public officials must not be required to predict the advance of constitutional law at their peril.

We have held that a state official has an affirmative duty to protect another from third parties if, but only if, a "special relationship" exists between the two. We have found such a relationship between employees of a state social services agency and a child placed by the agency whom the employees know to be in jeopardy. *Estate of Bailey by Oare v. County of York*, 768 F.2d

503 (3d Cir. 1985). While the Supreme Court has not yet put its imprimatur on the "special relationship" doctrine, a number of other Courts of Appeals have embraced it and, for present purposes, we may accept it, *arguendo*, as clearly established law. *See, e.g., Jensen v. Conrad*, 747 F.2d 185, 193-95 (4th Cir. 1984) (reviewing prior caselaw on "special relationship" doctrine and stating guidelines for "special relationship" analysis, but holding defendant state and county social services agency officials entitled to immunity from suit alleging failure to protect abused children because the law as it affected them was not clearly established at the time of the alleged wrongdoing), *cert. denied* 470 U.S. 1052 (1985); *Taylor v. Ledbetter*, 818 F.2d 791, 797-98 (11th Cir. 1987) (in banc) (analogizing to prison context, finding that a special relationship exists between state foster care agency officials and foster children); *cf. DeShaney v. Winnebago County Dep't of Social Services*, 812 F.2d 298, 303 (7th Cir. 1987) (recognizing special relationship in prison context, but finding "no basis in the language of the due process clauses or the principles of constitutional law for a general doctrine of 'special relationship'"), *cert. granted* 108 S. Ct. 1218 (1988); *Harpole v. Arkansas Dep't of Human Services*, 820 F.2d 923, 926 (8th Cir. 1987) (agreeing with Seventh Circuit that special relationship concept is applicable only in prison or prison-like environments). Neither this court nor any other federal court of appeals has held, however, that a special relationship exists between a school administrator and students within his or her jurisdiction.

The court's argument for finding a special relationship is quite properly based on analogy. The analogies employed, however, are not sufficiently close to the situation before us to make the court's conclusion "readily apparent" to reasonable school

administrators. While school attendance is mandatory, for example, the relationship between a superintendent of a public school district and high school students within the district is clearly distinguishable from that between a social worker and her five-year old ward or that between a jailer and his incarcerated charge. Indeed, the differences between the warden-prisoner relationship and the relationship of school officials to schoolchildren were recognized by the Supreme Court in *Ingraham v. Wright*:

> The prisoner and the schoolchild stand in wholly different circumstances, . . .
>
> The schoolchild has little need for the protection of the Eighth Amendment. Though attendance may not always be voluntary, the public school remains an open institution. Except perhaps when very young, the child is not physically restrained from leaving school during the school hours; and at the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment.
>
> The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner.

430 U.S. 651, 670 (1976). The same characteristics distinguish the situation of the schoolchild from that of the foster child. As the Eleventh Circuit said in *Taylor v. Ledbetter*, in the course of finding an analogy between the situation of a foster child and that of a prisoner,

> *Ingraham v. Wright* . . . is not a bar to this holding. . . . In *Ingraham*, the Court discussed the cost of providing additional benefits and safeguards to school children threatened with punishment. It found the cost of benefits and additional safeguards high and the risk of harm to school children low. In the foster home setting, recent events lead us to believe that the risk of harm to children is high. . . . Children in foster homes, unlike children in public schools, are isolated; no persons outside the home setting are present to witness and report mistreatment. The children are helpless. Without the investigation, supervision, and constant contact required by statute, a child placed in a foster home is at the mercy of the foster parents.

818 F.2d at 797.

Because of these distinctions, I would be reluctant to deny immunity to these defendants even if the plaintiff were Ms. Grove and Wright's assault on her had followed her complaint about him. We need not decide that issue, however. It is one thing to hold that a public school administrator has a duty to protect a particular student within his or her jurisdiction whom he or she knows to be in particular jeopardy. It is another to hold that there is an affirmative duty to protect an individual in a position like that of Stoneking, whom the administrator had no reason to believe was any more at risk from sexually aggressive teachers than her female classmates.[1] The court points

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1. To say, as does the court, that Stoneking "was a member of a known and identifiable class of potential victims -- female students in general, and female band members in particular" serves neither to cabin the newly-created liability nor to bring this case within the scope of a precedent of which these school administrators should have known.

to nothing that should have made the leap between these two propositions apparent to these school administrators. Indeed, authorities relied upon by the court suggest that there is no duty to protect in the absence of notice that a particular individual is in peril. In *Jensen v. Conrad*, for example, the court described its prior caselaw on special relationships as having held such relationships existed "with respect to inmates in the state's prisons or patients in its mental institutions *whom the state knows to be under specific risk of harm* from themselves or others in the state's custody or subject to its effective control." 747 F.2d at 193 (emphasis supplied). And in *Estate of Bailey*, we held that a special relationship and concomitant affirmative constitutional duty arises where a state social services agency is aware that *a particular child* has been abused. *See also Wood v. Ostrander*, No. 87-3924, slip op. at 8551-56 (9th Cir. July 13, 1988) (holding that a police officer was not entitled to qualified immunity where he had arrested Wood's male companion, taken the car keys, and left Wood stranded in a high-crime area five miles from her home at 2:30 a.m., and reasonably should have been aware of the danger to Wood); *White v. Rochford*, 592 F.2d 381, 383-86 (7th Cir. 1979) (holding that police officers were not entitled to qualified immunity where they had arrested the uncle of three minor children, leaving the children stranded in the car on a busy eight-lane expressway, and could not have avoided knowing of the danger to the children).

Because the court here holds the defendant officials personally liable in damages for the commission of a constitutional tort that is established as such only by the opinion in this case, I respectfully dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

J. Order of Supreme Court of the United States, No. 88-802, March 6, 1989

Smith v. Stoneking

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

March 6, 1989

Mr. Kenneth D. Chestek
Murphy, Taylor, et al.
518 State Street
Erie, PA 16501

Re: Frederick Smith, etc., et al.,
v. Kathleen Stoneking
No. 88-802

Dear Mr. Chestek:

The Court today entered the following order in the above entitled case:

The motion of petitioners to consolidate this case with No. 88-1350, Smith v. Sowers, is denied. The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. _____ (1989).

Very truly yours,

/s/ Joseph F. Spaniol, Jr.,
Clerk

K. Opinion and Order, U.S. Court of Appeals for Third Circuit, No. 87-3637, August 16, 1989 (on remand)

Stoneking v. Bradford Area School District, et al.

Filed: August 16,1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 87-3637

KATHLEEN STONEKING

v.

BRADFORD AREA SCHOOL DISTRICT, FREDERICK SMITH, in his individual and official capacity as principal of the Bradford Area High School; RICHARD MILLER, in his individual and official capacity as assistant principal of the Bradford Area High School; and FREDERICK SHUEY, in his individual and official capacity as Superintendent of the Bradford Area School District,

Frederick Smith, Richard Miller, and Frederick Shuey,

Appellants

On Appeal from the United States District Court for the Western District of Pennsylvania (ERIE)
(D.C. Civil No. 87-00063 E)

Argued February 3, 1988

Decided September 12, 1988

Certiorari Granted March 6, 1989

On Remand from the Supreme Court of the United States March 6, 1989

Argued on Remand from the Supreme Court
May 18, 1989

Before: SLOVITER, STAPLETON, and
MANSMANN, *Circuit Judges*

(Opinion filed August 16, 1989)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

This case is before us on remand from the United States Supreme Court which vacated our judgment and remanded for further consideration in light of *DeShaney v. Winnebago County Department of Social Services*, 109 S. Ct. 998 (1989). This case was originally heard on the appeal of the individual

defendants from the denial by the district court of their motion for summary judgment on the grounds of qualified immunity. We affirmed, rejecting the defendants' contention that they were not alleged to have violated plaintiff's clearly established right. *Stoneking v. Bradford Area School Dist.*, 856 F.2d 594 (3d Cir. 1988) (*Stoneking I*), *vacated sub nom. Smith v. Stoneking*, 109 S. Ct. 1333 (1989). It is now incumbent upon us to reconsider that decision.[1]

I.

Kathleen Stoneking filed suit under 42 U.S.C. § 1983 against the Bradford Area School District, Frederick Smith, the principal of the Bradford Area High School, Richard Miller, the assistant principal, and Frederick Shuey, the superintendent of the School District. Each of the individual defendants was sued in both his individual and official capacity. Stoneking prayed for relief in the form of compensatory and punitive damages against Shuey, Smith, Miller and the School District.

Stoneking's complaint alleged that Edward Wright, a School District employee who was the Band Director at Bradford High, used physical force, threats of reprisal, intimidation and coercion to sexually abuse and harass her and to force her to engage in various sexual acts beginning October 1980, when she was a high school student, and continuing through Stoneking's sophomore, junior and senior

1. Appellants argue that the fact that the Supreme Court has remanded this case for reconsideration in light of *DeShaney* "strongly suggest[s]" that *DeShaney* is indistinguishable and controls the outcome of this case. Appellants' Supplemental Brief on Remand at 8. We know of no authority for the proposition that a direction that we give "further consideration" to a case is in effect a direction as to the outcome. If the Supreme Court wished to direct an outcome, we are confident that it would have so stated.

years until her graduation in 1983 and thereafter until 1985. Defendants concede that some of these acts occurred in the band room at the high school and on trips for band functions, as well as in Wright's car and in his house while Stoneking babysat or after he gave her a music lesson. Wright was ultimately prosecuted for various sex-related crimes and pled guilty.

Stoneking averred that in 1979, before Wright's actions toward her, another female member of the band informed Smith that Wright had attempted to rape or sexually assault her; that Smith, in his capacity as principal, maintained a personal file on Wright which contained reports of complaints of sexual misconduct by female students in the band program; that Smith announced to Wright a "policy" with respect to his contact with female students under which he was to have no further "one on one" contacts with female band members; that Smith, Miller and Shuey "failed to take any action to protect the health, safety and welfare of the female student body" and Stoneking, App. at 10; that Miller and Shuey were also on notice of the complaints of sexual misconduct by Wright and of the policy adopted by Smith under which Wright was to have no one-on-one conduct with female band members, or, if Shuey was not aware, it was because of "the defective and deficient policies and customs" of the School District, App. at 11; and that Wright threatened his victims that if they reported his actions they would incur "loss of parental support, the esteem of friends and the dissolution of the school band which had become . . . a significant institution to the School District and the community in general," App. at 12.

After discovery in this case and in cases filed by other students who alleged they were also sexually abused by Wright, defendants moved for summary

judgment in the actions against them in their individual capacities on the basis of qualified immunity. As we explained in our earlier opinion, defendants contended that "no clearly settled law existed, either at the time of the incidents complained of in the plaintiff's Complaint or as of the present time, which would cause a reasonable person to know either of the constitutional right which allegedly has been violated or that the alleged acts or failure to act on the part of the individual defendants would lead to a violation of that constitutional right." *See* 856 F.2d at 596.

The district court denied the defendants' motion for summary judgment, holding that there was evidence from which a jury could conclude that defendants were reckless in their handling of an incident of abuse which had been reported to Smith in 1979, in their failure to investigate other reported incidents involving Wright and other female students, and in their attempts to remedy and/or rectify the problems involving Wright. *Stoneking v. Bradford Area School Dist.*, 667 F. Supp. 1088, 1098 (W.D. Pa. 1987).

On appeal, defendants argued that they were entitled to qualified immunity because they had no clearly established duty to protect Stoneking, and therefore there was no basis upon which a violation of 42 U.S.C. § 1983 could be predicated. We rejected that contention, holding that under the applicable state law a special relationship arose between the school officials and students entrusted to their care, and that the Pennsylvania child abuse reporting and *in loco parentis* statutes, coupled with the broad common law duty of officials to students, evidenced a desire on the part of the state to provide affirmative protection to students. 856 F.2d at 603. Defendants now argue that the Supreme Court's decision in *DeShaney*

controls our decision and mandates a holding that the school authorities owed no constitutional duty of protection to Stoneking.

In *DeShaney*, the Court held that a minor could not maintain an action against Winnebago County, its Department of Social Services, and various individual employees of the Department for injuries he received at the hands of his father, even though the county caseworker returned DeShaney to the father's custody and allegedly knew or should have known of the risk of violence to him at his father's hands. The Court's analysis was straightforward: it held that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." 109 S. Ct. at 1004. It rejected the analysis adopted by, *inter alia*, this court in *Estate of Bailey by Oare v. County of York*, 768 F.2d 503, 510-11 (3d Cir. 1985), that under similar circumstances a "special relationship" arose between the state and the child which imposed an affirmative constitutional duty to provide adequate protection.

The Court held that because there was no constitutional duty on the state to provide its citizens with particular protective services, "the State cannot be held liable under the [Due Process] Clause for injuries that could have been averted had it chosen to provide them." 109 S. Ct. 1004 (footnote omitted). It distinguished DeShaney's situation from those "limited circumstances [in which] the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." 109 S. Ct. at 1004-05. It stated that prior cases stood only for the proposition that, "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being," 109 S. Ct. at

1005-06 (citing *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) (state must provide involuntarily committed mental patients with services necessary to insure their reasonable safety), and *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (prison authorities must treat medical needs of an inmate)).

In light of the Supreme Court's discussion in *DeShaney* distinguishing between affirmative duties of care and protection imposed by a state on its agents and constitutional duties to protect, we can no longer rely on the statutory and common law duties imposed in Pennsylvania on school officials as the basis of a duty to protect students from harm occurring as a result of a third person.

Arguably, our earlier discussion noting that "students are in what may be viewed as functional custody of the school authorities" during their presence at school because they are required to attend under Pennsylvania law, *see* 856 F.2d at 601 (citing 24 Pa. Stat. Ann. § 13-1327 (Purdon Supp. 1988)), is not inconsistent with the *DeShaney* opinion. In *DeShaney*, the Court stated that "[h]ad the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect." 109 S. Ct. at 1006 n.9. The Court then explicitly referred to court of appeals cases holding, by analogy to *Estelle* and *Youngberg*, "that the State may be held liable under the Due Process Clause for failing to protect children in foster homes from mistreatment at the hands of their foster parents," but expressed no view on the validity of this analogy. *Id.* (citing *Doe v. New York City Dept. of Social Services*, 649 F.2d 134, 141-42 (2d Cir. 1981); *Taylor ex rel. Walker v.*

Ledbetter, 818 F.2d 791, 794-97 (11th Cir. 1987) (en banc), *cert. denied*, 109 S. Ct. 1337 (1989)).

The situation of school children, compelled by state law to attend school, who are physically mistreated by School District employees, may not be dissimilar to that of children in foster homes mistreated by their foster parents. However, we prefer not to rest our decision again on an affirmative duty to protect such students in this situation because the uncertainty of the law in this respect may cause further delay. We are advised that the trial of this case against the School District and the defendants in their official capacities has been held up during the pendency of the appeal by defendants on the denial of their motion for summary judgment on the claims against them in their individual capacities. Therefore, we believe it is more expedient to decide whether plaintiff's claim before us would withstand summary judgment even if we could not rely on the special relationship which the Supreme Court's footnote in *DeShaney* may still leave as a viable basis for liability.

II.

The principal distinction between DeShaney's situation and that of Stoneking is that DeShaney's injuries resulted at the hands of a private actor, whereas Stoneking's resulted from the actions of a state employee. The significance of the status of the perpetrator as a private actor rather than as a state official is referred to on numerous occasions in the *DeShaney* opinion. Not only is the Court's statement of the holding in terms of the identity of the actor ("a State's failure to protect an individual *against private violence* simply does not constitute a violation of the Due Process Clause," *id.* at 1004), but the analytic steps taken by the Court to reach that holding continuously take note of the status of the person

responsible for the injuries. *See, e.g.*, "nothing in the language of the Due Process Clause itself requires the state to protect the life, liberty and property of its citizens *against invasion by private actors*;" the Due Process Clause "forbids *the State itself* to deprive individuals of life, liberty or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to insure that those interests do not come to harm *through other means*;" the purpose of the Due Process Clause "was to protect the people *from the State*, not to insure that the State protected them *from each other*." 109 S. Ct. at 1003 (emphasis added).

Unlike DeShaney's father, who was referred to throughout the *DeShaney* opinion as a private third party, Wright was a school district employee subject to defendants' immediate control. In fact, many of Wright's interactions with Stoneking occurred in the course of his performance of his official responsibilities, such as during school-sponsored events and trips, and sometimes on school property.

It is immaterial for this purpose whether Wright's sexual abuse is viewed as attributable to the state. This consideration would be relevant had Stoneking sued Wright under section 1983, alleging that he acted under color of state law. She did not. Instead, the suit is against the School District and its supervisory officials, and they were incontestably acting under color of state law.

Defendants argue that Stoneking's emphasis on the fact that Wright was an agent and employee of the school district is merely an assertion of "supervisory liability", or *respondeat superior*, which cannot be a basis of liability. *See Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 691 (1978). However, this is not a case in which Stoneking alleges that

defendants are vicariously liable because of Wright's actions. Instead, she argues defendants are liable because of their own actions in adopting and maintaining a practice, custom or policy of reckless indifference to instances of known or suspected sexual abuse of students by teachers, in concealing complaints of abuse, and in discouraging students' complaints about such conduct. She argues that these practices, customs or policies created a climate which, at a minimum, facilitated sexual abuse of students by teachers in general, and that there was a causal relationship between these practices, customs or policies and the repeated sexual assaults against her by Wright. Thus, this is not *respondeat superior* in another guise, but an assertion of liability against the individual defendants based on theories recognized in a line of Supreme Court cases.

Nothing in *DeShaney* suggests that state officials may escape liability arising from their policies maintained in deliberate indifference to actions taken by their subordinates. As the Supreme Court recently reconfirmed in *City of Canton v. Harris*, 109 S. Ct. 1197, 1205 (1989), a municipality may be liable under section 1983 where its policymakers made "a deliberate choice to follow a course of action . . . from among various alternatives," (quoting *Pembauer v. Cincinnati*, 475 U.S. 469, 483-84 (1986) (plurality op.)), and the policy chosen "reflects deliberate indifference to the constitutional rights of [the city's] inhabitants," 109 S. Ct. at 1206. *See also Monell*, 436 U.S. at 690-91 (1978) (government body may be sued for constitutional deprivations visited pursuant to governmental "custom", "practices" or "usage").

This is an independent basis for liability previously pled and preserved by Stoneking which is unrelated to the issue decided in *DeShaney*. Liability of municipal policymakers for policies or customs

chosen or recklessly maintained is not dependent upon the existence of a "special relationship" between the municipal officials and the individuals harmed. *See Bordonaro v. McLeod*, 871 F.2d 1151 (1st Cir. 1989), *petition for cert. filed*, 57 U.S.L.W. 3843 (U.S. June 18, 1989) (No. 88-2036) (liability against police chief and mayor for unauthorized action of police officers in forcing entry into bar and beating patrons based on the police officials' constructive knowledge of custom and deficient policies in recruitment and training).

Thus, to the extent that the Supreme Court's remand of this case in light of *DeShaney* required us to consider whether Stoneking still may maintain a viable section 1983 claim if there is no predicate duty by defendants to protect her, we hold that she may because she has also alleged that defendants, with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused her constitutional harm.

III.

Defendants argue that Wright cannot be considered to have been acting pursuant to any School District policy and that it is outlandish and scandalous of Stoneking to suggest "that the school officials actually wanted and encouraged teachers to sexually abuse their students." Appellants' Supplemental Brief on Remand at 25. Stoneking did not, and need not, so suggest. As the Supreme Court stated in *Canton*, "[i]t may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees." 109 S. Ct. at 1205. Nonetheless, it continued, if the need for more or different training is so obvious, and the inadequacy so likely to result in

the violation of constitutional rights, "the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id.* It continued, "[i]n that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury." *Id.*

In any event, appellants' argument that there was no policy, custom or practice is a merits issue, which we cannot resolve on this interlocutory appeal. If there are contested issues of material fact, they must go to the jury. *See Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985) ("claim of immunity is conceptually distinct from the merits of the plaintiff's claim"); *Turpin v. Mailet*, 619 F.2d 196, 201 (2d Cir.), *cert. denied*, 449 U.S. 1016 (1980) ("The issue of authorization, approval or encouragement is generally one of fact, not law."). As we suggested in *Chinchello v. Fenton*, 805 F.2d 126, 130-31 (3d Cir. 1986), the denial of a motion for summary judgment claiming qualified immunity based on the "I didn't do it" defense will not be immediately appealable under *Mitchell*. Nonetheless, we believe that we must decide whether Stoneking has produced evidence sufficient to create a material issue of fact about the existence of a custom, practice or policy of deliberate indifference to misconduct by teachers, since that is directly related to the "fact-specific" inquiry into the qualified immunity defense asserted by defendants. *Anderson*, 483 U.S. at 641.

IV.

The principles applicable to defendants' assertion of qualified immunity have not changed to any significant degree since our opinion in *Stoneking I*. It is the defendants' burden to establish that they are entitled to such immunity. *Ryan v. Burlington*

County, 860 F.2d 1199, 1204 n.9 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1745 (1989). The defendants must show that their conduct did "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Under the test announced in *Harlow*, reasonableness is measured by an objective standard; arguments that the defendants desired to handle or subjectively believed that they had handled the incidents properly are irrelevant. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). The defendants are entitled to qualified immunity if reasonable officials in the defendants' position at the relevant time could have believed, in light of clearly established law, that their conduct comported with established legal standards. *See id.* at 641.

Harlow explicitly chose not to discuss the question of how to evaluate the "'state of the law'" during prior periods, leaving this issue to the lower courts. *See* 457 U.S. at 818 n.32 (citation omitted). This court does not require "relatively strict factual identity" between applicable precedent and the case at issue. *People of Three Mile Island v. Nuclear Regulatory Comm.*, 747 F.2d 139, 144 (3d Cir. 1984). "[S]ome but not precise factual correspondence" to precedent would be required. *Id.*; *see also Anderson*, 483 U.S. at 640.

We expect officials to "apply general, well-developed legal principles." *People of Three Mile Island*, 747 F.2d at 144. We have explained that we have "adopted a broad view of what constitutes an established right of which a reasonable person would have known," *Sourbeer v. Robinson*, 791 F.2d 1094, 1103 (3d Cir. 1986), *cert. denied*, 483 U.S. 1032 (1987), which requires us to undertake "an inquiry into the general legal principles governing analogous

factual situations, if any, and a subsequent determination whether the official should have related this established law to the instant situation." *Hicks v. Feeney*, 770 F.2d 375, 380 (3d Cir. 1985).

It may seem ludicrous to be obliged to consider whether it was "clearly established" that it was impermissible for school teachers and staff to sexually molest students. Nonetheless, we construe the proper inquiry as whether it was established that the students' rights were constitutionally based. Applying this standard, we reiterate the conclusion we reached in *Stoneking I* that the constitutional right Stoneking alleges, to freedom from invasion of her personal security through sexual abuse, was well-established at the time the assaults upon her occurred. The Supreme Court in considering the closely analogous right implicated by corporal punishment in schools, held that "[a]mong the historic liberties . . . protected [by the Due Process Clause] was a right to be free from . . . unjustified intrusions on personal security." *Ingraham v. Wright*, 430 U.S. 651, 673 & n.41 (1977).[2] *See also Black v. Stephens*, 662 F.2d 181, 188 (3d Cir. 1981), *cert. denied*, 455 U.S. 1008 (1982) ("[a] law enforcement officer's infliction of personal injury on a person . . . may deprive a victim of a fourteenth amendeent 'liberty'"); *Curtis v Everette*,

2. By 1980, this circuit had invoked Ingraham v. Wright in varied contexts. *See, e.g.*, Romeo v. Youngberg, 644 F.2d 147 (3d Cir. 1980) (in banc) (right of mentally retarded to freedom from assault in state institution), *vacated on other grounds*, 457 U.S. 307, 315 (1982) (but agreeing with court's application of *Ingraham*)); Halderman v. Pennhurst State School and Hospital, 612 F.2d 84, 98 (3d Cir. 1979) (in banc), *rev'd*, 452 U.S. 1 (1981); United States ex. rel. Caruso v. United States Board of Parole, 570 F.2d 1150, 1157 (3d Cir.), *cert. denied*, 436 U.S. 911 (1978) (considering parole revocation challenge; noting that liberty for due process purposes extends to "[p]ersonal security from physical violence").

489 F.2d 516, 518-19 (3d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974) (prisoner's liberty interest implicated in assault by fellow prisoner).

A teacher's sexual molestation of a student is an intrusion of the schoolchild's bodily integrity not substantively different for constitutional purposes from corporal punishment by teachers. Reasonable officials would have understood the "contours" of a student's right to bodily integrity, under the Due Process Clause, to encompass a student's right to be free from sexual assaults by his or her teachers. *See Anderson*, 483 U.S. at 639-40 (discussing level of particularity required for definition of clearly established rights).

Since a teacher's sexual molestation of a student could not possibly be deemed an acceptable practice, as some view teacher-inflicted corporal punishment, a student's right to be free from such molestation may be viewed as clearly established even before *Ingraham*. *See Rochin v. California*, 342 U.S. 165, 172 (1952) (substantive due process violation occurs where conduct "shocks the conscience"); *cf. Mitchell v. Forsyth*, 472 U.S. 511, 534 (1985) (right against warrantless security wiretaps was not "clearly established" where many successive administrations employed the practice and considered it constitutional).

We turn then from the issue of the clearly established constitutional right of Stoneking to be free from sexual abuse by school staff to an inquiry into the objective reasonableness of defendants' conduct from late 1980 through at least 1983 when Stoneking was molested by Wright while still a student. *Anderson* teaches us that this inquiry into reasonableness requires examination of the information possessed by the defendants. 483 U.S. at 641. We set forth some of the evidence in the record

because the parties now agree that we are not limited to the allegations of the complaint on which our prior opinion was based. *But see Stoneking I*, 856 F.2d at 597-98 nn.5, 6 & 7.

According to the deposition testimony of Theresa Rodgers, her social studies teacher Richard DeMarte sexually accosted her in late 1977 or early 1978. *See* 667 F. Supp. at 1100 (summarizing Rodgers deposition). She immediately reported the incident to Miller and Smith. They responded by warning her that it would be her word against the teacher's and that she should not tell her parents. *Id.* Although Smith told Rodgers that he would "take care" of the problem, DeMarte's personnel file shows no evidence of any disciplinary action taken against him; to the contrary, his teaching evaluation showed a perfect score. *Id.*

According to the deposition testimony of Judith Grove Sowers, she was sexually assaulted by Wright in 1979 and reported the incident to Miller and Smith. She claims that Smith told her "it was my [Sowers'] fault. That's why he wanted to clear up the rumors because he wanted the band to get back on their feet again. . . . He had told me that if the rumors were true . . . I could find myself in front of a jury, in front of a judge, telling exactly what happened, that being that I had been drinking [and that I was] at his house voluntarily . . . I wouldn't look very good is what he said." *Id.* at 1101 n.24 (quoting deposition). Miller brought Wright to the office, asked Sowers to repeat her allegation in front of him, and asked Wright if it was true, which Wright denied. Supp. App. at 7 (Sowers deposition).

According to the deposition testimony of Sowers' father, who requested a conference with Miller and Sowers about the incident, the defendants attempted to persuade him that no teacher would behave as his daughter alleged. 667 F. Supp. at 1101 (citing

deposition testimony). Both Sowers and her father testified that she was presented with the option of recanting her story in front of the band or withdrawing from all band activities. *Id.* Sowers stated that the band was assembled and she was called before it for this purpose, but fled from the room in tears. *Id.*

As the district court noted, it could be inferred that "the 'forced apology' served as a trump card in the hands of Edward Wright," who could threaten his other victims with similar treatment if they reported his actions, *id.* at 1101-02, and Stoneking in fact testified that she did not report Wright's assaults because "I knew about Judy Grove and what happened." Supp. App. at 16.

Smith's handwritten notes refer to three other incidents in 1981-1982 with respect to sexual harassment by DeMarte, the social studies teacher. In 1981, Lori Tsepelis complained to Miller and Smith that DeMarte had kissed her on the back of the neck several times while she was taking a make-up test. *See* Transcript of Deposition of Smith at 70-83. Ms. Tsepelis' parents also complained. *Id.* at 84-85. DeMarte admitted one kiss, explaining "that he had kissed her on the cheek as a thank you for her having brought food to him at the radio station on two occasions in November." *Id.* at 74. Smith conceded that when a teacher kisses a student it is generally a sexual advance, *id.* at 91, but Smith and Miller merely arranged that Ms. Tsepelis would, for the remainder of the semester, pick up her homework from DeMarte via Miller and that she would not be scheduled for DeMarte's class in the future. Although Smith told DeMarte "he had not used good judgment in having [Ms. Tsepelis] alone in the room," *id.* at 93, he placed no discipline report in DeMarte's file.

Two months later, two female students reported to Miller that another student, Lorie Lamberson, was crying in the restroom and when she emerged she told Smith and Miller that she had gone to DeMarte's room with a friend to get a make-up assignment, that he sent her friend away, blindfolded her to demonstrate the sense of touch, and after doing so was down on his hands and knees looking up her dress. The student was so distraught that she was sent to the nurse's office and then told to contact her parents. *Id.* at 99-106. When she spoke to her mother, she stated "'that she had a problem like Lori Tsepelis.'" *Id.* at 110. Although Smith testified that he subjectively believed Ms. Tsepelis' story, his own notes state that "'before sending [Ms. Lamberson] home I brought up the fact that she and her mother were aware of the incident with Mr. DeMarte and Lori Tsepelis prior to today and hoped that she wasn't involved in *framing* Mr. DeMarte.'" *Id.* at 112 (emphasis added). DeMarte admitted the incident except for the complaint that he had looked up Ms. Lamberson's dress. Nonetheless, Smith's notes continue, "'I also pointed out that it was her word against [DeMarte's] and that Mr. Miller and I would have to judge from that.'" *Id.* at 115. Again, the only action taken was to arrange that the student be scheduled for a different class, *id.* at 119, and no reprimand or other note was placed in DeMarte's file.

The next year, another parent called to complain about DeMarte's relationship with a student because DeMarte had asked the student to sit on his lap at a Halloween party on a social occasion, *see id.* at 151-53, and again no written warning was placed in DeMarte's file. *Id.* at 160.

In sum, there is evidence in the record that between 1978 and 1982 Smith and Miller received at least five complaints about sexual assaults of female

students by teachers and staff members; that Shuey was told about some of these complaints; that Smith recorded these and other allegations in a secret file at home rather than in the teachers' personnel files, which a jury could view as active concealment; that the defendants gave such teachers excellent performance evaluations, which a jury could view as communication by the defendants to the teachers that the conduct of which they were accused would not be considered to reflect negatively on them; and that Smith and Miller discouraged and/or intimidated students and parents from pursuing complaints, on one occasion by forcing a student to publicly recant her allegation.

For this purpose, the fact that Stoneking did not complain to the defendants about Wright's molestation of her is not dispositive. *See Ryan v. Burlington County*, 860 F.2d at 1206-07 (prison officials not entitled to qualified immunity because, under the "reasonable official" standard, they should have known their actions were unconstitutional based on their general knowledge of the overcrowded prison conditions). Although Stoneking's failure to complain may be relevant at trial to her credibility or the causation issue, *see id.* at 1209, for qualified immunity purposes it is sufficient that there is adequate evidence that defendants were on notice of complaints of sexual harassment of students by teachers and staff at the school.

In their brief, defendants correctly state that "[i]n determining whether or not a public official is entitled to a defense of qualified immunity, one must identify legal principles governing analogous factual situations at the time the alleged constitutional violation occurred, and if any existed, determine whether the public officials should have related this established

law to the situation before them." Appellants' Supp. Brief at 26.

After *Monell* had established that government officials could be held liable for policies and practices which they established and maintained, this court held in two cases in 1981 that public officials in administrative positions with notice of assaultive behavior by their subordinates must not take actions which communicate that they encourage or even condone such behavior.

In *Commonweath v. Porter*, 659 F.2d 306, 309 (3d Cir. 1981) (in banc), *cert. denied*, 458 U.S. 1121 (1982), we considered the appeal of a chief of police and mayor who had been found liable by the district court for "engag[ing] in an extended pattern or practice of conduct denying persons lawfully in [the borough] their constitutional rights to be free from physical violence, mistreatment, threats, harassment . . . ." The physical violence had been inflicted by only one officer in the department, not by these two defendants. Instead, the charges against the police chief, much like those Stoneking raises against the defendants here, were that he received complaints about the conduct of the officer but took no steps to suspend, transfer or otherwise limit the officer's activities; publicly condoned the actions of the officer; and attempted to intimidate persons who complained about his conduct. *Id.* at 310. Similarly, the charges against the mayor stemmed from the fact that he received numerous complaints; carried out only perfunctory investigations, consisting merely "'of asking [the chief and the officer] whether there was any basis for the complaint'"; defended the officer publicly; and retaliated against officers who complained. *Id.* at 311 (quoting *Commonwealth v. Porter*, 480 F. Supp. 686, 702 (W.D. Pa. 1979)).

In the opinion of the majority affirming the district court's findings that the pattern of support shown by the police chief and mayor for the offending policeman amounted "'to a custom and usage under 42 U.S.C. § 1983 and *Monell*,'" *id.* at 312 (quoting *Commonwealth v. Porter*, 480 F. Supp. 686, 703 (W.D. Pa. 1979)), for which they could be held liable, we stated that *Rizzo v. Goode*, 423 U.S. 362 (1976), "requires that we focus on the degree to which [the] Chief . . . participated in a pattern of violation by virtue of knowledge, acquiescence, support and encouragement." 659 F.2d at 321. A different majority found no basis for liability as to the Borough Council because the evidence as to it consisted primarily of failure to investigate complaints and passage of resolutions supporting the policemen, which was insufficient to establish a pattern or plan. "[N]o more than inaction and insensitivity" had been shown, which did not establish the requisite causal link under *Rizzo v. Goode*. *Id.* at 336-37.

Porter demonstrates clearly that by 1981 an administrator's policy of curtailing investigation of complaints brought to the administrator's attention, intimidation of complainants, and/or defense of subordinates charged with misconduct was sufficient to constitute a custom or practice under *Monell*.

Again in 1981, we held that a jury was entitled to hold a city and its chief of police liable for adopting a policy which postponed disciplinary investigation of an officer against whom a complaint was lodged until after resolution of any arrest charge stemming from the incident. *Black v. Stephens*, 662 F.2d 181 (3d Cir. 1981), *cert. denied*, 455 U.S. 1008 (1982). We found that this policy could be construed to encourage officers to bring charges against citizens who accused the police of misconduct, and that proximate causation could be established on this basis. We also

held that the chief of police could be held liable for the promulgation and implementation of a policy which "encouraged the use of excessive force by the officers within the department." *Id.* at 183, 189-91.

Our holdings were consistent with those reached earlier by other courts of appeals. *See, e.g., McClelland v. Facteau*, 610 F.2d 693, 697-98 (10th Cir. 1979) (police chiefs may be held liable for failure to correct misconduct of which they have notice); *Sims v. Adams*, 537 F.2d 829, 832 (5th Cir. 1976) (complaint stated cause of action against mayor and chief of police for failure to control police officer's propensity for violence); *Turpin v. Mailet*, 579 F.2d 152, 167-68 (2d Cir. 1978) (en banc) (city could be liable under the Fourteenth Amendment for encouraging animosity among police officers against plaintiff which led them to believe that they could violate his civil rights with impunity), *vacated in light of Monell*, 439 U.S. 974 (1978), *reinstated*, 591 F.2d 426 (2d Cir. 1979) (per curiam) (case reinstated on same theory but under § 1983 in light of *Monell*); *judgment for plaintiff reversed, Turpin v. Mailet*, 619 F.2d 196, 202 (2d Cir.) (plaintiff failed to prove official policy where "there was no evidence of a prior pattern or practice of harassment"), *cert. denied*, 449 U.S. 1016 (1980).

In sum, although the mere failure of supervisory officials to act or investigate cannot be the basis of liability, *see Chinchello v. Fenton*, 805 F.2d 126, 133-34 (3d Cir. 1986), by at least 1981 when this court's cases in *Porter* and *Black* were decided (both incidentally arising, as this case does, in the Western District of Pennsylvania), it was clearly established law that such officials may not with impunity maintain a custom, practice or usage that communicated condonation or authorization of assaultive behavior.

If the testimony of the various complainants is believed, Smith and Miller discouraged and minimized reports of sexual misconduct by teachers. A jury could construe such actions, as plaintiff's expert did, as "encourag[ing] a climate to flourish where innocent girls were victimized." Affidavit of Chet Kent, App. at 55. Judge Stapleton in his dissent argues that under the law as it existed at the relevant time, "qualified immunity could be denied only if the circumstances were such that a reasonable school administrator would have realized he was communicating his approval to the offending teacher." Typescript dissenting op. at 3. Although that may seem a farfetched possibility, there is enough in this record from Smith and Miller's suggestion to Ms. Lamberson about "framing" DeMarte and their statement that it was "her word against his," as well as from the forced apology by Judy Grove Sowers about her allegations of Wright's sexual harassment, that a jury could reasonably conclude that such discouragement of complaints amounted to a communication of condonation of the teacher's behavior. Thus, Stoneking has asserted a sufficiently tenable theory that there was an "affirmative link," *see Rizzo v. Goode*, 423 U.S. at 371, between her injury and the policies and practices that Smith and Miller employed and affirmative acts they took in furtherance of them to make this a jury issue.

We are cognizant that defendants deny many of these allegations, and assert that they imposed an adequate policy to deal with Stoneking's allegations against Wright by ordering Wright "never to get into a 'one on one' situation with female students again." Appellants' Supplemental Brief at 4. Whether there was an adequate policy and whether their other defenses have merit will be up to the jury.

On the other hand, we must conclude, in light of our precedent, that Stoneking's claims against Shuey amount to mere "inaction and insensitivity" on his part. *See Porter*, 659 F.2d at 337. We cannot discern from the record any affirmative acts by Shuey on which Stoneking can base a claim of toleration, condonation or encouragement of sexual harassment by teachers which occurred in one of the various schools within his district.

For the foregoing reasons, we conclude that the district court did not err in denying the motion for summary judgment of defendants Smith and Miller on grounds of qualified immunity, but we conclude that Shuey's motion should have been granted.

V.

As we have alluded to previously, trial of this case has been pending in the district court for a substantial period of time while the qualified immunity issue has been litigated. Our conclusion that Smith and Miller are not entitled to qualified immunity as a matter of law in their individual capacities is not in any way suggestive of any view on the merits of Stoneking's claim against them personally or against all of the defendants in their official capacities as to which no qualified immunity can be asserted. Thus, we are hopeful that upon remand this case can proceed to an expeditious conclusion.

For the reasons set forth above, we will affirm the district court's denial of the motion for summary judgment as to Smith and Miller on the grounds of qualified immunity, and we will vacate the district court's order denying the motion for qualified immunity as to Shuey in his individual capacity, and remand with directions that his motion be granted.

Costs on appeal are to be borne by appellants Smith and Miller.

STAPLETON, *Circuit Judge*, Concurring in part and Dissenting in part:

After *DeShaney*, Ms. Stoneking's contention that the defendants owed her a well-established constitutionally based duty to protect her from Mr. Wright is no longer tenable. I agree with the court, however, that she alleges an alternative and distinct theory of liability that is not rejected in *DeShaney*. The issue for decision is whether the defendants have qualified immunity with respect to any damage liability that might be imposed upon them individually on that theory. The court concludes that Superintendent Shuey is entitled to immunity and I agree. I dissent, however, from the court's denial of immunity to Principal Smith and Assistant Principal Miller. Under *Anderson v. Creighton*, 483 U.S. 635 (1987) and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) cases, the relevant issue is whether reasonable school officials with the knowledge allegedly possessed by the defendants would have realized during the period from 1980 to 1983 that they were violating a well-established duty that they owed to Ms. Stoneking under federal statutory or constitutional law. That issue must be resolved by looking to the pre-1983 case law dealing with the circumstances under which a supervisor can be held liable for the constitutional tort of someone he or she supervises. As I read that case law[1] , the only well-established duty imposed upon a supervisor by federal law was the duty to refrain from affirmative encouragement of the offending conduct. Accordingly, unless the complaint alleges such

1. The state of the law after *City of Canton v. Harris*, 109 S.Ct. 1197, (1989), is simply not relevant to the issue presented by this appeal.

encouragement and unless Ms. Stoneking, after the filing of the motion for summary judgment, pointed to competent evidence from which a fact finder could find such encouragement, the defendants are entitled to immunity.

In *Commonwealth of Penn. v. Porter*, 659 F.2d 306 (3d Cir. 1981), this court, ruling on Police Chief Porter's liability, held that "encouragement" was a prerequisite to liability. We there stated that *Rizzo v. Goode*, 423 U.S. 362 (1976), "require[d] that we focus on the degree to which Chief Porter participated in a pattern of violation by virtue of knowledge, acquiescence, support *and encouragement*." 659 F.2d at 321 (emphasis added). We then cited the Chief's "active[] support" of the constitutional tortfeaser, and the "affirmative steps" he took to impede legal action against the subordinate. *Id.* at 322. As to the Mayor, the *Porter* court found that he had been "affirmatively involve[d]" with the constitutional tortfeasor and "strongly support[ed]" him. *Id.*

Porter's conclusions on this matter were reiterated in *Black v. Stephens*, 662 F.2d 181, 191 (3d Cir. 1981). In *Black*, this court stated that the evidence supported the jury's finding "of the encouragement and support *required* to hold the [police chief] liable under section 1983." (emphasis added). Finally, in *Chinchello v. Fenton*, 805 F.2d 126 (3d Cir. 1986), we first acknowledged that a plaintiff might have an easier time proving supervisory liability in other circuits than in ours. We then reviewed *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598 (1976) and its progeny and concluded that supervisory liability could be found only where the official had both "contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents" and where there were "circumstances

under which the supervisor's inaction could be found to have *communicated a message of approval to the offending subordinate.*" 805 F.2d at 133 (emphasis added).

Under these cases, I am unable to say that a reasonable school administrator would understand that he would violate the well-established constitutional rights of students by failing to pursue a complaint of sexual abuse by a teacher with sufficient aggressiveness or even by discouraging such complaints. Under the law as it then existed, qualified immunity could be denied only if the circumstances were such that a reasonable school administrator would have realized he was communicating his approval to the offending teacher.

I acknowledge that in some contexts failures to discipline teachers shown to have misbehaved and discouragement of complaints about misbehaving teachers might conceivably be a part of a pattern of conduct that would communicate approval by the administration. However, where the misconduct at issue is sexual abuse of high school students and where the administrator has expressly instructed the offending teacher never again to be alone with a female student, it would take a lot more than this record contains to permit a fact finder to conclude that Wright understood the administration to favor his misdeeds.

Because Ms. Stoneking has neither alleged nor shown evidence of affirmative encouragement of Wright's conduct by the individual defendants, I would hold that all three are entitled to immunity.

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No. 89-782

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1989

FREDERICK SMITH, in his individual and official capacity as Principal of the Bradford Area High School; RICHARD MILLER, in his individual and offical capacity as assistant principal of the Bradford High School; and FREDERICK SHUEY, in his individual and official capacity as Superintendent of the Bradford Area School District,

Petitioners,

vs.

JUDY GROVE SOWERS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether public school administrators who adopt a practice, custom or policy of active concealment, toleration and facilitation of instances of known or suspected sexual abuse of students by their teachers are entitled to qualified immunity where their conduct results in repeated sexual assaults of students by teachers.

2. Whether the constitutionally protected liberty interest of individuals in freedom from physical abuse and the corresponding duty of government officials not to sanction, encourage or facilitate violations of that interest by their subordinates were clearly established in 1979.

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STATEMENT OF THE CASE

a. Procedural posture.

Judy Grove Sowers ("Respondent" or "Sowers") commenced this action pursuant to 42 U.S.C. Section 1983 (1982) in the United States District Court for the Western District of Pennsylvania, Case No. 88-57, against the Bradford Area School District ("School District"), Frederick Smith, the principal of the Bradford Area High School, Richard Miller, the assistant principal, and Frederick Shuey, the superintendent of the School District.[1]

Pursuant to Fed.R.Civ.Pro. 12(b)(6), the defendants moved to dismiss Respondent's complaint on the ground, *inter alia*, of qualified immunity.[2] The district court denied the motion. *Sowers v. Bradford Area School District*, 694 F.Supp.125, 140 (W.D. Pa. 1988), App. at p. 79. The individual defendants ("Petitioners") appealed the district court's decision with respect to qualified immunity to the United States Court of Appeals for the Third

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[1] The individual defendants were sued in both their individual and official capacities.

[2] The defendants also moved to strike portions of certain paragraphs of the complaint on the grounds that these paragraphs "contain[ed] immaterial, impertinent and scandalous matters . . . " Motion to Dismiss and/or Strike p. 2, App. at p. 29. The district court denied this motion. *Sowers v. Bradford Area School District*, 694 F.Supp.125, 128 (W.D. Pa. 1988), App. at pp. 46-47. Only the issue of qualified immunity was immediately appealable under *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

Circuit, which affirmed by judgment order, without opinion, on January 31, 1989. Thereafter, Petitioners filed a Petition for Writ of Certiorari in the United States Supreme Court. On April 3, 1989, the Supreme Court granted certiorari in this case and remanded it to the Court of Appeals for "further consideration" in light of its recent decision in *DeShaney v. Winnebago Department of Social Services*, 489 U.S. ___, 109 S.Ct. 998, 57 L.Ed.2d 4218 (1989). App. at p. 87. On remand, the Court of Appeals again affirmed the judgment of the district court. App. at p. 1.

b. Statement of Facts.

In accordance with Fed.R.Civ.Pro. 12(b)(6), the facts material to the judgment of the district court and the Court of Appeals were derived primarily from the complaint. App. at pp. 73-76. In the district court, Petitioners appended to their motion to dismiss four of several hundred pages of previous deposition testimony of Respondent in three related cases.[3] However, the district court determined that the materials submitted by Petitioners were irrelevant to a determination of their motion to dismiss. App. at pp. 57-58.

The gravamen of Respondent's complaint was that the School District, acting through Petitioners, adopted a

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[3] Accordingly, Respondent filed a motion in the district court requesting that Petitioners' motion to dismiss be treated as one for summary judgment and disposed of as provided in Rule 56. The district court denied this motion.

pernicious practice, custom or policy of reckless indifference to and active concealment of instances of known or suspected sexual abuse of students by teachers; that this practice, custom or policy created a climate which facilitated and encouraged sexual abuse of students by teachers in general; and that this practice, custom or policy specifically resulted in a sexual assault upon Respondent by the Bradford Area High School band director, Edward Wright ("Wright"). Complaint at ¶¶23-26, 30-31, App. at pp. 13-18, 20.

Respondent's complaint set forth a number of incidents of abuse of students by teachers and Respondents' responses thereto in support of her allegation that an unconstitutional practice, custom or policy existed in the School District. The first incident of abuse described in the complaint occurred in late 1977 or early 1978 when a social studies teacher, Richard DeMarte, sexually accosted Theresa Rogers, a student at the Bradford Area High School. Theresa Rogers immediately reported this incident to Mr. Miller and Dr. Smith, who warned her that it was going to be her word against Mr. DeMarte's and that she should not go home and tell her parents about the assault. Complaint at ¶26(a), App. at p. 14.[4]

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[4] The details of this incident as described in Theresa Rogers' deposition are set forth at page 1100 of the district court's opinion in the related case of *Stoneking v. Bradford Area School District*, 667 F.Supp. 1088, 1100 (W.D.Pa. 1987), *aff'd*, 856 F.2d 594 (3d Cir. 1988), *vacated sub nom. Smith v. Stoneking*, ___ U.S. ___, 109 S.Ct. 1333 (1989), *aff'd on remand*, 882 F.2d 720 (3d Cir. 1989).

In or about 1978, and periodically thereafter, Petitioners received complaints of sexually abusive language and improper sexual advances by a shop teacher, George Brady. Again, no disciplinary action was taken against Mr. Brady and the administrative response to his actions was to place a sign on Brady's shop door prohibiting students from congregating there. Complaint at ¶26(b), App. at pp. 14-15.

Wright assaulted Respondent on June 16, 1979.[5] After Respondent reported the incident to the school administration, Dr. Smith required Respondent to appear before the assembled high school band for the purpose of issuing a public apology for having accused Wright of the sexual assault. Dr. Smith told Respondent that a public apology was a condition to her continued participation in the band. At the band meeting, Dr. Smith opened the floor to questions from Respondent's fellow students, but Respondent did not issue an apology and left the band room overwhelmed and distraught from the experience. Complaint at ¶¶17-18, App. at p. 12; Complaint at ¶26(c), App. at p. 15.

On or about January 12, 1981, Petitioners Smith and Miller were informed by another female student of the Bradford High School that Richard DeMarte had kissed

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[5] Whether Judy Sowers consumed alcoholic beverages at her sister's wedding prior to Wright's assault upon her has no relevance to Petitioners' claim to qualified immunity in this case. *See* Petition for Writ of Certiorari at pp. 9-10.

her on the neck several times in a classroom. No disciplinary action was taken against DeMarte and the administration's response to the incident was to remove the student from DeMarte's class and issue to him a "no one-on-one" directive. Complaint at ¶26(d), App. at p. 15.

On or about March 10, 1981, another female student of the Bradford High School reported to Smith and Miller that Richard DeMarte had blindfolded her in a classroom, ostensibly to demonstrate the sense of touch, and she observed him on his hands and knees looking up her dress. No disciplinary action was taken against DeMarte, and Smith actively intimidated the student from pursuing further action by stating that it was "DeMarte's word against hers" and "Mr. Miller and he would have to judge from that." Another "no one-on-one" directive was issued to DeMarte. Complaint at ¶26(e), App. at pp. 15-16.

In or about March of 1982, two female students complained to the Petitioners that Mr. Brady had written sexually suggestive notes and further had asked female students to come into a shop room alone after school. No disciplinary action was taken against Brady. Complaint at ¶26(f), App. at p. 16.

On or about November 23, 1982, yet another female student at the High School complained to Smith and Miller that Richard DeMarte had touched her inappropriately and was attempting to develop a romantic relationship. No disciplinary action was taken against DeMarte. Complaint at ¶26(g), App. at p. 16.

Commencing in or about June of 1984 and continuing approximately through November of 1984, the Petitioners

were advised by numerous sources, including the parents of a female basketball player in the high school, that her male coach, Alex Nuzzo, was attempting to develop a romantic relationship with her. Despite numerous complaints, no disciplinary action was taken and Nuzzo was simply issued a written "no one-on-one" directive by Smith with the knowledge and consent of Miller, Shuey and the School Board. Complaint at ¶26(h), App. at pp. 16-17.

In or about late September or early October of 1984, a female band member informed a guidance counselor that Wright had attempted to sexually molest her in a vehicle. In addition, this student notified the counselor that Wright was presently molesting another student and had molested another student prior to her graduation.[6] This information was relayed to Dr. Smith and ultimately Mr. Shuey. Complaint at ¶26(i), App. at p. 17. On or about December 15, 1984, Dr. Smith met with Mr. Wright and issued another no one-on-one directive, but informed Wright that "no one had accused him of any wrongdoing." Complaint at ¶26(j), App. at p. 17.

In or about October of 1985, Petitioners were informed that Richard DeMarte had attempted to sexually assault a former Bradford High School student, while attending a homecoming celebration. No disciplinary

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[6] This latter student was Kathleen Stoneking, the plaintiff in the related case of *Stoneking v. Bradford Area School District*. The details of her ordeal are set forth in the district court opinion in that case. See *Stoneking v. Bradford Area School District*, 667 F.Supp. 1088 (W.D.Pa. 1987).

action was taken against DeMarte. Complaint at ¶26(k), App. at p. 17.

In or about March of 1986, three female Bradford High School students complained to Petitioners that the girls swimming coach had made improper sexual comments. No disciplinary action was taken against the coach. Complaint at ¶26(l), App. at pp. 17-18.

In addition to this history of condoned abuse in the high school, Respondent's complaint also described Wright's course of misconduct and its relationship to Petitioners. Prior to his employment in the School District, Wright had attempted to sexually molest and harass various female students while employed as the band director in the Jasper School District. Complaint at ¶20, App. at p. 13. During his tenure in the Bradford School District, Wright sexually abused or harassed other female students in the district, both prior and subsequent to assaulting Respondent. Complaint at ¶21, App. at p. 13. Petitioners were on actual or constructive notice that Wright posed a significant threat to female students at the Bradford Area High School in general and Respondent in particular prior and subsequent to June 16, 1979. Complaint at ¶22, App. at p. 13.

Wright finally resigned as the band director of the School District in March 1986. However, his resignation was prompted not by any action of the School District or Petitioners. Instead, his resignation came only after public disclosure of his abuse by a private psychologist. Complaint at ¶26(m), App. at p. 18.

Count I of Respondent's complaint alleged that Petitioners' conduct created a climate wherein child abusers,

such as Wright, could prey upon female students with impunity and that this conduct was a proximate cause of a deprivation of Respondent's constitutionally protected right of freedom from sexual abuse. Complaint at ¶¶30-31, App. at p. 20.

Count II alleged that Petitioners conspired to conceal from the public instances of known or suspected sexual abuse of students by various teachers. The alleged overt acts in furtherance of the conspiracy included, *inter alia*, Smith's keeping of a personal, secret file in his desk drawer at home memorializing many of the complaints against teachers. The alleged proximate results of the conspiracy were the same as those under Count I. Complaint at ¶¶33-39, App. at pp. 21-22.

ARGUMENT

a. Summary of Argument

In *Stoneking v. Bradford Area School District*, 882 F.2d 720 (3d Cir. 1989) ("*Stoneking II*"), the United States Court of Appeals for the Third Circuit found it unnecessary to determine whether Petitioners had a duty to protect Kathleen Stoneking from sexual abuse by Edward Wright because the complaint and record in that case supported an alternative ground for denying Petitioners' motion for summary judgment based on qualified immunity. The Court of Appeals held that a reasonable jury could conclude from the evidence adduced in the district court that Petitioners adopted and maintained practices, customs or policies that facilitated sexual abuse of students by teachers in general, and that a causal link existed between

Petitioners' own actions and the repeated sexual assaults against Stoneking by Wright. In this action, the Court of Appeals correctly concluded the Respondent's complaint supports the denial of qualified immunity to Petitioners based on the same theory of liability upon which the court rested its decision in *Stoneking II*.

This theory of liability is independent and distinct from the principles confirmed by this Court in *DeShaney* and from the "special relationship" analysis utilized by the Court of Appeals in *Stoneking I*. In *Stoneking II*, the Court of Appeals determined that this alternative theory of liability was clearly established and recognized in the decisions of this Court, its own decisions, and the decisions of various other federal courts of appeals prior to the period of time during which Petitioners committed the acts complained of in Respondent's complaint. Even Judge Stapleton agreed in his dissenting opinion that Stoneking "allege[d] an alternative and distinct theory of liability that is not rejected in *DeShaney*."[7] *Stoneking II*, 882 F.2d at 731 (Stapleton, Judge, concurring in part and dissenting in part).

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[7] In his dissent, Judge Stapleton disagreed with the majority regarding whether the record contained sufficient evidence to defeat Petitioners' motion for summary judgment with respect to this alternative theory of liability. In their petition, Petitioners assert that the "Court of Appeals went on to, in effect, decide a motion for summary judgment on the merits [of the alternative theory of liability] that Smith and Miller were never permitted to argue." Petition for Writ of Certiorari at p. 13, n.3. This assertion is simply untrue. On remand to the

(Continued on following page)

The Court of Appeals also noted that the situation of school children, compelled by state law to attend school, "*may* not be dissimilar" to other custodial circumstances that give rise to a governmental duty of protection. *Stoneking II*, 882 F.2d at 723-24 (emphasis supplied). Petitioners contend that this statement constitutes a "*sub silentio* holding" reaffirming that "they had a duty to protect school students from harm." Petition for Writ of Certiorari at p. 11. However, the Court of Appeals specifically declined "to rest [its] decision again on an affirmative duty to protect . . . students in this situation . . . " 882 F.2d at 724. Thus, the "duty to protect" or "special relationship" theory of liability, which prompted this Court's remand of the case for further consideration in light of *DeShaney*, no longer provides the basis for the holding of the Court of Appeals in *Stoneking II* or the instant case. Any reference in *Stoneking II* to this theory of liability is pure dicta and does not warrant review by the United States Supreme Court.

The remainder of Petitioners' contentions are factual arguments, which similarly do not justify consideration

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(Continued from previous page)

Court of Appeals, the issue of Petitioners' facilitation and tacit encouragement of abuse was thoroughly briefed by counsel for both parties. In *Stoneking II*, on remand, Petitioners submitted an additional "Supplemental Appendix" in direct response to the alternative theory of liability argued by Respondent in her brief. Petitioners' statement that "the Court of Appeals majority issued its ruling *sua sponte*" is contradicted by Petitioners' own submissions to the Court of Appeals.

by this Court. The Court of Appeals correctly concluded that the allegations of the complaint in this case support all of the factual findings necessary to sustain personal liability against Petitioners for the constitutional deprivation sustained by Respondent.

b. The statements made by the Court of Appeals in *dicta* do not merit review by the Supreme Court.

The Court of Appeals did not base its decision upon a "duty to protect" theory of liability. Petitioners concede this, but nevertheless argue that "[t]he failure of the Court of Appeals to expressly rule on the *DeShaney* issue has the practical effect of denying Smith, Miller and Shuey's claim of qualified immunity with respect to the 'duty to protect' theory of liability." Petition for Writ of Certiorari at p. 12. They further contend that "the trial court *may* choose to charge the jury that Smith, Miller and Shuey had a duty under the Fourteenth Amendment to protect Stoneking from the harm that allegedly befell her . . . " *Id.*

Petitioners' statements regarding the "practical effect" of *Stoneking II* is plainly incorrect given the holding of the Court of Appeals in that case with respect to Shuey:

> [W]e must conclude, in light of our precedent, that Stoneking's claims against Shuey amount to mere "inaction and insensitivity" on his part. See *[Commonwealth v.] Porter*, 659 F.2d [306,] 337 [(3d Cir. 1981) (in banc), *cert. denied*, 458 U.S. 1121, 102 S.Ct. 3509, 73 L.Ed.2d 1383 (1982)]. We cannot discern from the record any affirmative acts by Shuey on which Stoneking can base a claim of toleration, condonation or

> encouragement of sexual harassment by teachers which occurred in one of the various schools within his district.
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> * * *
>
> [W]e will vacate the district court's order denying the motion for qualified immunity as to Shuey in his individual capacity, and remand with directions that his motion be granted.

Stoneking II, 882 F.2d at 731.

Petitioners' argument is also premature. They are complaining about a possible action that the district court "may" take with respect to an issue that the Court of Appeals found unnecessary to address. The Supreme Court has acknowledged on various occasions that it normally will not review issues not passed on by the Court of Appeals. *City of Canton, Ohio v. Harris*, 489 U.S. ___, 109 S.Ct. 1197, 1203, n.5 (1989); *Bowen v. American Hospital Association*, 476 U.S. 610, 625, n.11 (1986) (per Justice Stevens) (*quoting Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842 (1984)). The logic underlying this policy becomes even more compelling where the judgment of the Court of Appeals rests upon a well-established theory of liability such as that relied upon by the Court of Appeals in this case.

c. The theory of liability upon which the Court of Appeals based its judgment in *Stoneking II* is unaffected by this Court's decision in *DeShaney v. Winnebago County Department Of Social Services*.

DeShaney arose out of a State's failure to intervene and protect a small boy, Joshua DeShaney, who had been beaten and permanently injured by his father, with whom

he had lived. Joshua DeShaney's guardian ad litem commenced an action in federal court pursuant to 42 U.S.C. Section 1983 against certain social workers and other local officials who had received complaints that Joshua was being abused by his father, but who nonetheless had not acted to remove the boy from his father's custody. The plaintiff claimed that the defendants' failure to act had deprived Joshua DeShaney of his liberty in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Court rejected this argument, holding that "a state's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." 109 S.Ct. at 1004.

As the Court of Appeals noted, the "principal distinction" between *DeShaney* and *Stoneking II* is the status of the abuser and the abuser's relationship to the government body. *Stoneking II*, 882 F.2d at 724. In *DeShaney*, "the State [had] played no part in creating" the danger to Joshua DeShaney. 109 S.Ct. at 1006. No link existed between the defendants and the abuse of Joshua. Joshua had suffered his tragic fate at the hands of his father, "who was in no sense a state actor." *Id.* (footnote omitted). However, in the instant case, the abuser was a state actor whose assaults upon Respondent were facilitated by the conduct of his superiors and his status as director of the Bradford Area High School band.

The second critical distinction between *DeShaney* and the instant case is the nature of the conduct of the individual defendants in each case. In *DeShaney*, the defendants were guilty only of passive inaction in the face of private violence. In contrast, the complaint supports that

Petitioners actively concealed reports of abuse perpetuated by their subordinates upon students and actively intimidated students who did attempt to complain. As the Court of Appeals observed, "[n]othing in *DeShaney* suggests that state officials may escape liability arising from their policies maintained in deliberate indifference to actions taken by their subordinates." *Id.* at 725.

d. **Petitioners' contention that the holding of the Court of Appeals creates a "new theory of personal liability for school officials" is incorrect and does not merit Supreme Court review.**

Petitioners argue that the Court of Appeals created "a new theory of personal liability for school officials in their individual capacities." Petition for Writ of Certiorari at pp. 11, 24-25. This contention is inconsistent with this Court's analysis in *Kentucky v. Graham*, 473 U.S. 159 (1985). In *Graham*, the Court explained that a "personal-capacity suit," in contrast to an "official-capacity suit," "seeks to impose personal liability upon a government official for *actions he takes* under color of state law." 473 U.S. at 165 (emphasis added) (citations omitted). The theory of personal liability urged by Respondent and adopted by the Court of Appeals in *Stoneking II* is predicated upon the acts of Petitioners that facilitated, condoned and encouraged the abuse of students by teachers under Petitioners' supervisory authority. As the Court of Appeals noted, Petitioners "were incontestably acting under color of state law" with respect to the supervisory conduct at issue. *Stoneking II*, 882 F.2d at 724.

"On the merits, to establish *personal* liability in a §1983 action, it is enough to show that the official, acting

under color of state law, caused the deprivation of a federal right." *Graham*, 473 U.S. at 166 (emphasis in original, citations omitted). The Court of Appeals correctly concluded that Respondent's allegations in this case are sufficient to support a finding that the acts of Petitioners caused the deprivation of Respondent's constitutionally protected rights. Although Petitioners disagree with this conclusion, such factual disputes do not warrant review by the Supreme Court.

Once it is established that the complaint supports a *prima facie* cause of action against government officials in their personal or individual capacities, the officials may attempt to raise various defenses, including qualified immunity, which Petitioners have raised in the instant case. *Graham*, 473 U.S. at 166-67. Under the defense of qualified immunity, government officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635 (1987). Consistent with this principle, the United States Court of Appeals for the Third Circuit requires "some but not precise correspondence" with applicable precedents, and demands that "officials apply well-developed legal principles." *People of Three Mile Island v. Nuclear Regulatory Comm.*, 747 F.2d 139, 144 (3d Cir. 1984).

In *Stoneking II*, the Court of Appeals correctly concluded that both the constitutionally protected rights of

Stoneking and the corresponding duties of Petitioners were clearly established prior to and during the period of time Petitioners committed the acts complained of in Stoneking's complaint. The liberty interest in freedom from state intrusions into bodily security is as old as the Constitution itself. *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980). The applicability of this interest to public school children has been recognized at least since 1977, when this Court held in *Ingraham v. Wright*, that "corporal punishment in the public schools implicates a constitutionally protected liberty interest." 430 U.S. 651, 672 (1977). As the Court of Appeals observed, the individual right to be free from more egregious intrusions upon personal security, such as sexual molestation, predates this Court's decision in *Ingraham*:

> Since a teacher's sexual molestation of a student could not possibly be deemed an acceptable practice, as some view teacher-inflicted corporal punishment, a student's right to be free from such molestation may be viewed as clearly established even before *Ingraham*.

Stoneking II, 882 F.2d at 727 (citing *Rochin v. California*, 342 U.S. 165 (1952) (substantive due process violation occurs where conduct "shocks the conscious")).

Similarly, in 1976, this Court recognized that government officials charged with supervisory authority could be held liable under Section 1983 where an "affirmative link" exists between the supervisors' own actions and the misconduct of their subordinates. *Rizzo v. Goode*, 423 U.S. 362, 371 (1976). The Court of Appeals found that this basis for liability was well-established at the time Respondent was assaulted by Wright. Specifically, the

Court of Appeals held that "by at least 1981 . . . it was clearly established law that [supervisory] officials may not with impunity maintain a custom, practice or usage that communicated condonation or authorization of assaultive behavior." *Stoneking II*, 882 F.2d at 730. The Court of Appeals based this conclusion upon multiple federal cases, including this Court's decision in *Rizzo v. Goode* and two of its own cases decided in 1981. *Stoneking II*, 882 F.2d at 729-30 (citing *Commonwealth v. Porter*, 659 F.2d 306, 309 (3d Cir. 1981) (en banc), *cert. denied*, 458 U.S. 1121 (1982); *Black v. Stephens*, 662 F.2d 181 (3d Cir. 1981), *cert. denied*, 455 U.S. 1008 (1982)).

The Court of Appeals noted that its "holdings [in *Porter* and *Black*] were consistent with those reached earlier by other federal courts of appeals. *Id.* at 730 (citing *McClelland v. Facteau*, 610 F.2d 693, 697-98 (10th Cir. 1979) (police chiefs may be held liable for failure to correct misconduct of which they have notice); *Sims v. Adams*, 537 F.2d 829, 832 (5th Cir. 1976) (complaint stated cause of action against mayor and chief of police for failure to control police officer's propensity for violence); *Turpin v. Mailet*, 579 F.2d 152, 167-68 (2d Cir. 1978) (en banc) (city could be liable under the Fourteenth Amendment for encouraging animosity among police officers against plaintiff which led them to believe that they could violate his civil rights with impunity), *vacated in light of Monell*, 439 U.S. 974 (1978), *reinstated*, 591 F.2d 426 (2d Cir. 1979) (per curiam) (case reinstated on same theory but under §1983 in light of *Monell*); judgment for plaintiff reversed, *Turpin v. Mailet*, 619 F.2d 196, 202 (2d Cir.) (plaintiff failed to prove official policy where "there was no evidence of a

prior pattern or practice of harassment"), *cert. denied*, 449 U.S. 1016 (1980)).

Petitioners argue that the court's holding in *Stoneking II* represents an expansion of the theory of liability reconfirmed by this Court in *City of Canton v. Harris*, 489 U.S. ___, 109 S.Ct. 1197 (1989). Although the Court of Appeals noted that its analysis was consistent with *City of Canton*, its denial of qualified immunity to Petitioners was based exclusively on the state of the law as it existed when Stoneking and Respondent were being abused by Wright. The Court of Appeals merely recognized that Stoneking's theory of liability against the School District and Petitioners in their official capacities will not be determined according to the law as it existed in 1981, but as it exists today, including the principles reconfirmed in *City of Canton*. *See also Bordanaro v. McLeod*, 871 F.2d 1151 (1st Cir.) (liability against police chief and mayor for unauthorized actions of police officers forcing entry into bar and beating patrons based on the police officials' constructive knowledge of custom and deficient policies in recruitment and training), *cert. denied sub nom., Everett v. Bordanaro*, ___ U.S. ___, 110 S.Ct. 75 (1989). The Court of Appeals properly concluded that its decision in *Stoneking II* dictates the outcome of Petitioners' appeal in this case.

CONCLUSION

WHEREFORE, Respondent prays that this Honorable Court deny the Petition for writ of Certiorari.

Respectfully submitted,

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No. 89-782

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

FREDERICK SMITH, in his individual and official capacity as Principal Bradford Area High School; **RICHARD MILLER**, in his individual and official capacity as assistant principal of the Bradford High School; and **FREDERICK SHUEY**, in his individual and official capacity as Superintendent of the Bradford Area School District

Petitioners

vs

JUDY GROVE SOWERS

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. Introduction

Sowers attempts to defeat Supreme Court review of this important case by overstating the facts so egregiously that it appears there are factual issues that require resolution at the trial court. However, Smith, Miller and Shuey will not engage in a debate with Sowers as to the facts of the case, other than to point out that even under the facts she alleges, important issues of law exist in this case which merit Supreme Court review.

II. The Holding of the Court Below Regarding the Alleged "Duty to Protect" Is Not Mere Dicta

Sowers attempts to dismiss the Third Circuit's discussion of the original "duty to protect" theory as mere "dicta" which need not be reviewed by this Court. They claim that Smith, Miller and Shuey's argument that they are exposed to potential liability at trial on that theory is somehow "premature," Respondent's Brief at p. 12. But this argument completely misapprehends the nature of qualified immunity.

Qualified immunity is an immunity *from suit* or, as this Court has described it, an "entitlement not to stand trial or face the other burdens of litigation . . .." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). If the defendants are exposed to trial, the immunity has been wholly lost. Even if the trial court elects not to charge the jury that these men could be found liable for failing to protect Sowers, the fact that they have been subjected to the trial at all results in

the complete loss of their immunity. If they are properly immune, as they claim, they are entitled to avoid going to trial.

It must be remembered that the Third Circuit has affirmed the order of the district court holding that a duty to protect high school students from sexual abuse of teachers was clearly established in 1979, and which grounded this duty to protect on the substantive due process component of the 14th amendment. The prospect of trial based upon this law of the case is not a distant, speculative possibility; unless the district court's order is reversed, trial on this theory is a certainty.

Since the Third Circuit's holding leaves the "duty to protect" theory open and viable for prosecution at trial, it completely and effectively deprives Smith, Miller and Shuey of their right not to face trial on the "duty to protect" theory. Holdings which deprive litigants of rights are not mere dicta; they are holdings subject to review by higher courts. Smith, Miller and Shuey respectfully request that this Honorable Court review this implicit but effective holding of the Third Circuit.

III. Edward Wright Was Not a State Actor

In their principal brief, Smith, Miller and Shuey point out that this Court's decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. , 109 S.Ct. 998 (1989) establishes that they owed no duty under the U.S. Constitution to protect Sowers from sexual as-

saults by Edward Wright. Sowers attempts to distinguish *DeShaney* in an effort to avoid this inescapable conclusion. However, her attempt to distinguish *DeShaney* fails.

On page 13 of her brief, she claims without supporting argument of any sort that Wright was a state actor, while Randy DeShaney was not. This is simply not true. When Edward Wright allegedly attacked Judy Grove Sowers in his home that Saturday afternoon, he was not acting in his capacity as a band director or a teacher. Judy Grove, then between her junior and senior years of high school, could not possibly have believed that the attack was meant as part of her musical training or education, or was authorized by any school official. If the assault in fact took place, Edward Wright acted out of his personal sexual desires, not out of any attempt to fulfill his duties as a music instructor. In no sense of the word was the alleged attack "state action."

The "state action" requirement for Fourteenth Amendment cases, of course, has been frequently debated and discussed by the courts and commentators. One of the most complete and most recent discussions of the "state action" requirement can be found in the case of *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982). In discussing whether patient transfers by a state-regulated nursing home constituted "state action," the Court enunciated a three-step analysis as to when state action can be found.

> The complaining party must . . . show that

"there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." [citation omitted] The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains. The importance of this assurance is evident when, as in this case, the complaining party seeks to hold the State liable for the actions of private parties.

Second, although the factual setting of each case will be significant, our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. [citations omitted] Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment. [citations omitted]

Third, the required nexus may be present if the private entity has exercised

> powers that are "traditionally the exclusive prerogative of the State." [citations omitted]

Id., 457 U.S. at 1004-1005.

The United States Court of Appeals for the Fourth Circuit has very recently applied this three-step analysis in a § 1983 claim very similar to *DeShaney* and which also bears some resemblance to this case. In *Milburn v. Anne Arundel County Department of Social Services*, 871 F.2d 474 (4th Cir. 1989), *cert. denied* 1989 U.S. LEXIS 4189 (1989) the Court was faced with a *DeShaney*-type complaint that a county children's services agency had failed to protect a child from abusive parents. However, unlike *DeShaney*, the abusive parents in *Milburn* were foster parents selected by the County after the child had been placed in the County's custody. Nevertheless, the Court found that the foster parents were not state actors, relying upon the Supreme Court's three-step analysis set forth in *Blum, supra*.

Likewise, applying the *Blum* analysis in this case, it is readily apparent that Wright is not a state actor. First, there is absolutely no nexus between the Bradford Area School District or its administrators and Wright's alleged gratification of his sexual desires; his actions may therefore not be treated as those of the District. It cannot be said in this case that the District is responsible for Wright's alleged sexual misconduct.

Second, it cannot be said that the District or its administrators exercised coercive power or has provided such significant encouragement to Wright, either overt or

covert, that his decision to sexually molest Sowers must in law be deemed to be that of the District. Even the alleged approval of or acquiescence in Wright's conduct is not sufficient, under *Blum*, to justify holding the District responsible for those initiatives.

Third, sexual abuse of students is not traditionally the exclusive prerogative of the State. To even suggest, as Sowers does, that such criminal conduct can be attributed to the State in any fashion is absurd.

In *Blum*, there is a far stronger argument for a finding of state action than in this case. There, the actions complained of by plaintiffs occurred as a direct result of the implementation of nursing home regulations by the State of New York, and the State of New York received a direct benefit from the implementation of those regulations in the form of reduced cost to the state for nursing care. In the case at bar, the School District and its administrators did nothing to compel or coerce Wright to act as he did, and received absolutely no conceivable benefit from Wright's actions. If the Supreme Court can find no state action in *Blum, a fortiori* there can be no state action in this case.

IV. Sowers Has Not Truly Alleged Active Conduct

The second way in which Sowers attempts to distinguish *DeShaney* is in the nature of the conduct of the state officials against whom liability is sought. Sowers claims on page 13-14 of her brief that the public officials in *DeShaney* were guilty merely of "passive inaction," while she claims

Smith, Miller and Shuey "actively concealed" abuse and "actively intimidated" students who complained. Aside from the fact that the record does not support such outrageous allegations, Sowers is merely playing semantic games.

Even if Smith, Miller and Shuey "concealed" allegations of sexual abuse of students and "intimidated" students who made complaints, it does not follow that they are responsible for the sexual abuse which took place before the alleged concealment or intimidation. Any "concealment" which occurred subsequent to the alleged assault on Sowers could not have anything to do with that assault. There is nothing in the record to support any claim that Wright knew of any allegations of sexual abuse by any teacher other than himself; indeed, if Smith, Miller and Shuey concealed such allegations it is unlikely that he would have such knowledge. Thus, whether any such allegations were made prior to his alleged attack on Sowers, the concealment of those allegations played no part in motivating him to assault Sowers. There is absolutely no connection between the alleged conduct of Smith, Miller and Shuey and the alleged injury to Sowers.

Sowers' Brief in Opposition to Petition for Writ of Certiorari goes on at length regarding alleged assaults on students other than Sowers and by actors other than Wright. Very little is said of Wright's alleged assault on Sowers other than Sowers' self-serving statement that her consumption of alcoholic beverages prior to traveling uninvited to Wright's private home is of "no relevance." (Sowers Brief p. 4, footnote 5). There is absolutely nothing

in the record to so much as suggest that any conduct of Smith, Miller and Shuey vis-a-vis these other teachers and students caused Wright to decide to assault Grove at his home during that summer vacation. Nor is there anything in the record that demonstrates that Wright had assaulted any Bradford Area student prior to June 16, 1989 or that Smith, Miller or Shuey were even informed of the alleged assault on Sowers until months after it had occurred. Sowers defies logic to suggest that her complaint established a duty on the part of Smith, Miller and Shuey to protect her from Wright's alleged assault. To the contrary, what is clear is that there is no allegation of any assault on Sowers by Wright subsequent to the time that the June 16, 1979 incident was made known to Smith, Miller and Shuey.

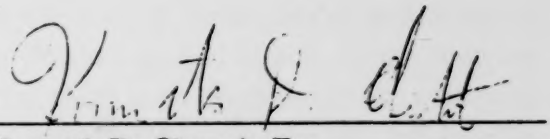
Smith, Miller and Shuey did not possess a crystal ball with which they could predict unknowable future events. Yet, the ability to forecast random future events would have been necessary for Smith, Miller and Shuey to have fulfilled the "duty" which Sowers has claimed. The incident of June 16, 1989 was the first allegation of misconduct by Wright reported to Smith, Miller and Shuey. Even if it is assumed that they did not properly respond to this report, these subsequent actions could not be said to have caused the assault.

In truth, the most that can be said of the alleged conduct of Smith, Miller and Shuey, even if all of the allegations made are believed, is that they failed to prevent Wright from committing the single isolated assault on Grove. Characterizing this passive conduct by using the

adverb "active" does not make the conduct active. Smith, Miller and Shuey's conduct in failing to prevent Wright's assault is no more "active" misconduct than the failure of the Winnebago County Children's Services officers to prevent Randy DeShaney's assault on his son.

V. Conclusion

Petitioners pray that a Writ of Certiorari issue from this Honorable Court to review the judgment of the United States Court of Appeals for the Third Circuit in this action. In the event that the Petition is granted, Petitioners pray that the judgment of the Court below be reversed, that the cause be remanded, and that the Court below be directed to dismiss Petitioners as defendants, as prayed for in the Petition.



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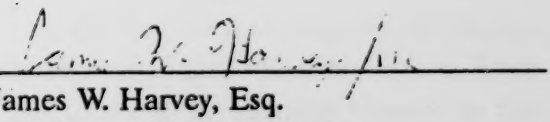

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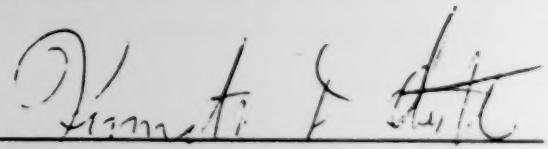
VI. Certification of Membership

It is hereby certified that both of the Attorneys for the Petitioners are members of the Bar of the Supreme Court of the United States.



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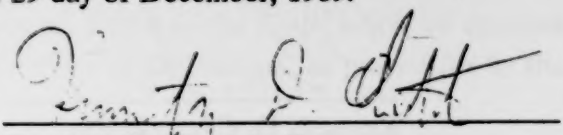
VII. Proof of Service

I hereby certify that three copies of the within Petition for Writ of Certiorari were served on Wallace J. Knox and Sean J. McLaughlin, Esq., 120 West 10th Street, Erie, PA 16501, this 29 day of December, 1989.



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No. 89-782 (5)

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

FREDERICK SMITH, in his individual and official capacity as Principal of Bradford Area High School, RICHARD MILLER, in his individual and official capacity as Assistant Principal of the Bradford High School; and FREDERICK SHUEY, in his individual and official capacity as Superintendent of the Bradford Area School District.

Petitioners

v.

JUDY GROVE SOWERS

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICI CURIAE OF THE NATIONAL SCHOOL BOARDS ASSOCIATION AND THE NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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No. 89-782

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

FREDERICK SMITH, in his individual and official capacity as Principal of Bradford Area High School, RICHARD MILLER, in his individual and official capacity as assistant principal of the Bradford High School; and FREDERICK SHUEY, in his individual and official capacity as Superintendent of the Bradford Area School District,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THIRD CIRCUIT

BRIEF AMICI CURIAE OF THE NATIONAL SCHOOL BOARDS ASSOCIATION AND THE NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Counsel for both parties have consented to the timely filing of this brief. The consents will be submitted to the clerk as soon as they are received.

QUESTIONS PRESENTED

1. Are school students "at liberty" during summer vacation so that, under the rationale of this Court in DeShaney v. Winnebago there exists no duty under the Fourteenth Amendment for school administrators to protect them from criminal assaults?

2. Was there clearly established law in 1979 that school administrators had a duty under the Fourteenth Amendment to protect school students from criminal assaults?

3. Can this Court's holding in City of Canton v. Harris that municipal bodies may be held accountable for a policy amounting to "deliberate indifference" to

the rights of citizens be extended to create a new theory of personal liability for municipal officials?

INTEREST OF AMICI

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's forty-nine state school boards associations, the Hawaii State Board of Education, the District of Columbia school board and the U.S. Virgin Islands. Established in 1940, NSBA is the only major national educational organization representing 15,300 school boards and their 97,000 members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The individuals who compose this nation's school boards are elected (97%) or appointed community representatives,

most of whom are not professional educators. They are responsible under state law for the fiscal management, staffing, continuity, and educational standards of the public schools.

The principles established by the lower court, if left standing, could significantly expand liability of local school boards for alleged negligence of school personnel in failing to protect students. The lower court has established a federal tort standard which imposes liability on public entities for "negligence" even though it is problematic as to whether general theories of causation under common law principles of negligence law would impose liability. Given the perceived "deep pockets" of school districts, plaintiffs would seek damages in federal courts, under 42 U.S.C. section 1983, for

injuries to students inflicted by the actual perpetrators, who are "judgment proof."

Amicus curiae National Association of Secondary School Principals (NASSP) is a voluntary association of approximately 42,000 administrators of public and private secondary schools throughout the United States. NASSP was organized in 1916 to provide a spokesman for secondary school administrators in the formulation of all aspects of educational policy in the United States and to improve programs for students enrolled in these schools.

NASSP is committed to the improvement and strengthening of secondary education. It seeks to be responsive to changes both in the school environment and in the role of education in society. It promotes research and development in curriculum standards and

course content. It seeks to develop higher standards and qualifications for secondary school administration through professional intern and improvement programs. It seeks to focus attention on national educational problems by providing leadership services to its members and information to the general public. NASSP is organized exclusively for educational and charitable purposes.

Although NASSP does not customarily seek to intervene in litigation, it believes that this case involves issues of such fundamental public importance as to make an expression of its views essential. NASSP believes that it is critical to the efficient conduct of public education and maintenance of public confidence and support in public schools that school administrators be free to exercise their professional

judgment on behalf of students and teachers alike without subjecting themselves and their employing boards to potential liability in federal court for any and all injury which a student may suffer as the result of the criminal acts of another member of the school community. In short, neither the board nor its administrators should be made the insuror of student well-being, under strained interpretations of civil rights law.

STATEMENT OF THE CASE

Amici incorporate by reference thereto the statement of the case contained in brief of Petitioners.

ARGUMENT

I. Summary of Argument

The court of appeals erred in its first decision in holding that there is a "special relationship" between schools

and their students giving rise to a duty to protect the students from criminal action of others. The court compounded its error by holding, in its second decision, that the school district and its administrators can be held liable under either of two theories established by the court, even in absence of a "special relationship." Under the first theory, the court ruled that a school district can be held liable for its "reckless indifference" in allegedly failing to make clear to the band director that criminal assaults are not permitted. Under the court's second theory, the district can be held liable for its failure to train its employees to deal with allegations of child abuse.

Since both theories as propounded by the Supreme Court are predicated on the existence of a "special relationship"

between the parties, there is no liability under either theory unless the court makes the determination on "special relationship." Although the court purports to avoid ruling on the issue in DeShaney v. Winnebago County Department of Social Services, 109 S.Ct. 998 (1989), it has not done so. The issue was addressed implicitly, and undoubtedly, the trial court will merely assume the existence of the relationship and go on to instruct on duty to train and reckless disregard. This does not seem to be an appropriate way to rehear the case "in light of DeShaney."

The court erred in interpreting Supreme Court precedent to hold that Respondent has a fundamental right to be free from bodily injury. This Court has ruled only that there is a liberty interest in bodily integrity, for

procedural due process purposes only. The Court has not ruled on the substantive due process issue.

School districts across the country are in need of an answer from this Court as to the scope of the so-called "Constitutional tort." This question cries out for resolution. School districts are being held liable in lawsuits brought under the Constitution for actions and inactions which are nothing more than common law torts.

II. The lower court erred in failing to expressly rule on the issue of "special relationship" because its "alternative" grounds must be predicated on a finding that a "special relationship" exists.

On remand of this case, this Court directed the court of appeals to reconsider its decision in light of DeShaney v. Winnebago County Department

of Social Services, supra. Instead of taking on the issue of whether the DeShaney precedent applies in a case involving a public employee, the court decided the case on other grounds, it says are "unrelated to the issue decided in DeShaney." Amici contend that the grounds are not in actuality independent from the DeShaney issue and that the court of appeals did by implication that which it refused to do expressly.

The court bases its new opinion on a determination that the school officials acted in "reckless indifference" to the abuse of students by teachers to the extent of implicitly encouraging continued abuse. The court further holds that constitutional rights were infringed by the district's failure to institute policies and practices to assure adequate training of employees to handle

complaints of abuse. The court of appeals declared that these are bases of liability that were left undisturbed by DeShaney.

The court of appeals' analysis, however, confuses standards of municipal liability with constitutional obligations. Petitioners cannot be held liable in this case without first finding that a "special relationship" exists between the school district and the students, sufficient to give rise to a constitutional duty to protect students from bodily harm. There is no independent fundamental right to be free from "reckless" or "deliberate indifference" of the state, whether arising out of "inadequate training" or otherwise.

If there is no predicate "special relationship" the concept of "reckless

indifference" as a basis for liability does not attach. The "deliberate indifference" standard for establishing liability was developed in the context of the eighth amendment in prison cases where there is a "special relationship" between the state and the plaintiff. Estelle v. Gamble, 429 U.S. 97 (1976) first set forth the standard. That case involved a prisoner who allegedly was not provided adequate medical attention while in prison. The Court held that the eighth amendment's proscription against cruel and unusual punishment includes the right to medical care for those whom the state is punishing by incarceration.

Estelle was decided under the eighth amendment, which is not applicable to the schools. Ingraham v. Wright, 430 U.S. 651 (1977). If the Estelle precedent is to be extended to schools, there must be

a showing of some kind of "special relationship" that would be analogous to that between the state and prisoners.

As another independent rationale for its ruling the lower court cites City of Canton v. Harris, 109 S.Ct. 1197 (1989), for the proposition that the injuries of the Respondent were caused by the school district's failure to train its employees. In Canton, the plaintiff allegedly suffered damage because the prison official failed to recognize the seriousness of her physical condition. Plaintiff alleged that the guard was improperly trained. This Court held that failure to train is an independent cause of action "only where failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. (Emphasis supplied.)" Canton, 109 S.Ct at 1204. The

constitutional "right" to which the policy were allegedly deliberately indifferent in Canton was the right to medical treatment, established in Estelle v. Gamble, supra. As noted above, this right to medical treatment derives from the protections afforded by the eighth amendment, which this Court has held does not apply to the schools. Thus, in order for a special relationship to exist between the schools and their students there must be some constitutional right, other than the eighth amendment, to which it can be attached. That nexus has not been drawn here.

Although the court of appeals disavowed any reliance on a duty to protect analysis, its reasoning contained an implicit finding that a "special relationship" exists between the school district and its employees and the

Respondent. Yet the lower court expressly refused to analyze this Court's decision in DeShaney in light of the facts in this case. At the least, this Court should remand the case for an express ruling on that question.

Although Amici believe that the lower court erred in its first decision, wherein the court held that there is a special relationship between the schools and the students giving rise to a duty to protect, the court's newest opinion in effect is based on the same premise but without the rationale to back it up.

III. The lower court erred in holding that there is an established fundamental right to be free from bodily harm.

The court begs the question of whether there exists a constitutional duty to protect students by its analysis of the constitutional right to be free

from bodily injury. Despite the appeals court's proclamations to the contrary, it is not "clearly established" that the right to be free from bodily harm is a "fundamental right" protected through a substantive due process analysis. It is a liberty interest protected by procedural due process, but this Court is yet to rule on the question of whether there is a fundamental substantive right to bodily integrity in the context of the public schools.

This Court in Ingraham v. Wright, 430 U.S. 651 (1977), held that the eighth amendment's proscription against cruel and unusual punishment does not apply to school corporal punishment. However, the court agreed that the student had a liberty interest in personal security which is protected through procedural due process. The Court held that procedural

due process was satisfied by Florida's statute which prohibits excessive force in administering corporal punishment.

The Court held that, although "corporal punishment in public schools implicates a constitutionally protected liberty interest . . . the traditional common-law remedies are fully adequate to afford due process." Id. at 672.

The Petitioners in Ingraham also claimed a violation of substantive due process: "Is the infliction of severe corporal punishment upon public school students arbitrary, capricious and unrelated to achieving any legitimate educational purpose and therefore violative of the Due Process Clause of the Fourteenth Amendment?" The Court expressly refused to address that question. 430 U.S. at 658 n.12, 679 n.47. Thus, citations to Ingraham in

support of the lower court's holding that there is a substantive due process right to "freedom from bodily harm" are inapposite.

There may be a substantive right to be free from bodily harm which is penumbral to express constitutional rights, but none of those rights are implicated here. For example, the eighth amendment protects those in the criminal system from "cruel and unusual punishment" which would include freedom from bodily harm. That amendment does not apply to schools. Other prisoner's rights would include a freedom from bodily harm component, e.g. the fifth amendment right relating to self incrimination and the sixth amendment right to counsel, but those rights also do not apply here. Thus, the court of appeals erred in holding that the

students had a clearly established constitutional right to be free from bodily harm of which the school officials should have been aware.

IV. School districts need guidance from this Court as to the scope of their constitutional duty, if any, to protect students from harm.

However heinous the conduct of the band director in this case, the conduct was certainly not condoned by the school district nor did it further any school district goal. The band director's conduct was solely in furtherance on his own personal objectives and, even if the school administrators were negligent in failing to stop him, it is difficult to understand how those failures rose to the level of a constitutional wrong.

It requires no gift of prophecy to anticipate that, if the decision of the court of appeals is left undisturbed,

litigants will frame their complaints with sufficiently florid allegations to survive a motion to dismiss, embroiling the federal courts in numerous disputes that should have remained in the state court system. It is doubtful that the Framers of the Constitution intended to make every state action, or failure to act, subject to federal court scrutiny merely through the mechanism of clever pleading.

In its first decision, the lower court cited numerous cases and treatises on tort law which allegedly establish the principal that a school district and its administrators should be held liable for the criminal acts of others. In its first decision, the court ruled there was "an adequate basis from the Pennsylvania child abuse reporting and in loco parentis statutes, coupled with the broad

common law duty owed by school officials to students to conclude there was a desire on the part of the state to provide affirmative protection to students." Stoneking v. Bradford Area School Dist., 856 F.2d 594, 603 (3d Cir. 1989). Thus, the court ruled that there was a constitutional duty to protect.

In its latest decision the court "reiterate[d] that the constitutional right Stoneking alleges, to be free from invasion of her personal security through sexual abuse, was well-established at the time the assaults upon her occurred." Stoneking v. Bradford Area School Dist. 882 F.2d 720, 726 (3d Cir. 1989). Again, the court confuses a liberty interest with a fundamental right.

If the liberty interest -- freedom from bodily injury -- is coterminus with a substantive fundamental right, then any

act of, or failure to act by, a public school official that affects a liberty interest of a student, employee or taxpayer is open to scrutiny by the federal courts. The courts could be called upon to determine not only whether the state provided procedural due process, but the court will also decide whether the action itself was correct. Should a school be closed? Should a dress code be instituted? Should the school offer an AIDS education program? Is a ten day suspension for a drug offense too long? Does the district have adequate policies and procedures in place to prevent athletic injuries and other injuries usually redressed under state tort laws.

If state statutes, such as child abuse laws exist, the failure to follow the statute would likely be held by the

lower court to deprive the person of a substantive due process right. Every state in the country has a statute requiring the reporting of child abuse which under the lower court opinion means that the school district is strictly liable under the U.S. Constitution for child abuse committed by anyone who has ever been a school employee no matter when or where the offense takes place - if there is evidence that someone in the school system had notice that the person might have committed such an act in the past.

In the case involving Judy Sowers there was no allegation that the school district had notice of prior acts of child abuse. Thus the mere failure to train is sufficient to give rise to liability.

Where state statutes impose higher

standards of care on certain school employees that, too, could raise the issue of "reckless disregard," where the employee fails to meet the higher standards. See Estate of Lindburg v. Mount Pleasant I.S.D., 746 S.W.2d 257 (Tex. Ct. App. 1987) (higher standard of care for school bus drivers); rev'd on ground of immunity 766 S.W.2d 208 (Tex. 1989).

In a survey conducted in the summer of 1989, NASSP attempted to determine the degree to which litigation and the threat of it affected the conduct of school principals in its membership. A random sample of the membership was selected and a statistically valid number of questionnnaires (just over 29%) were returned.

Only 9% of those responding had been involved in any school-related litigation

in the previous two years. Nevertheless, 58% of these same respondents reported that the threat of litigation and reports of high insurance company settlements had caused changes in school-related programs in their schools during this period. This would suggest the very wide "ripple effect" produced by the expanding number and scope of suits against school administrators and school districts -- even where such suits have not directly involved specific administrators.

While the 190 respondents to the survey reported the termination of only 16 curricular programs, they reported the modification of 246 others, about half of them because of lawsuits threatened or initiated. In addition nearly 51 extra-curricular programs were terminated, and another 301 were reportedly modified. All tolled, nearly

every other administrator responding to the survey had terminated a program, and nearly three more were modified by each respondent. When projected across the entire educational landscape of the country this represents an enormous curtailment of educational opportunity as the result of actual or feared litigation.

One could argue, of course, that the curtailment of school programs as a result of feared litigation represents only legitimate concern for the safety of students or others in the school community, and to the extent that it is caused by increased or novel litigation, that litigation is a positive and desirable thing. In order to evaluate that argument, it is necessary, however, to examine the kinds and quantity of programs actually curtailed.

Fortunately, this information was also sought in the survey.

Of the 614 curricular and extra-curricular programs reported as being terminated or modified the largest group, nearly one-third, involved athletics or cheerleading. Another 20% concerned classroom trips, vocational shop classes, and science labs, and more than 10% involved the use of volunteers in fundraising and other capacities on behalf of the school. It is difficult to argue that all of these activities were so hazardous as to warrant their elimination or modification. Yet that is exactly the effect flowing from the kind of imaginative litigation reflected in the case now before this Court. It is not difficult to imagine that the subjection of school districts, school board members and administrators to

liability for the kind of injury alleged herein will only lead those administrators and board members to eliminate any individualized instruction programs such as the kind giving rise to the claims presented here.

Indeed, the only other course of action open to school districts and their administrators would be the kind of action against teachers accused of sexual abuse which would undoubtedly trigger litigation or other threatened action by the teachers involved or their organizational representatives against school districts, administrators and board members whom they regarded as depriving them of their constitutional rights.

Unless the Supreme Court recognizes the effects implicit in the case before it, school districts, their boards and

administrators will be placed in a no-win situation -- and the real losers will be the millions of students whose educational opportunities will be foregone in the interest of the attenuated rights allegedly infringed by the Petitioners in the case at bar.

V. Conclusion

It does not appear that any useful purpose will be served by waiting until a trial of the facts in this case to pursue the issue of whether a "special relationship" exists between schools and students. The case cannot be tried below without an implicit assumption that the relationship exists.

By basing its decision on "reckless disregard" and "deliberate indifference" of the school officials to what it erroneously characterized as a "clearly established" fundamental constitutional

right, the court of appeals simply reaffirmed its earlier holding that a special relationship does exist between a school and its students which constitutionally obligates the school district to protect students from bodily harm. In other words, it implicitly assumes, without any analysis, that this Court's ruling in DeShaney does not apply in the school context. By so doing, the court of appeals has simply added to the confusion experienced by school districts and their officials regarding their constitutional duty, if any, to protect students from bodily harm.

For these reasons, Amici respectfully urge this Court to grant the writ of certiorari in this case to resolve this issue or at the very least to vacate the decision of the Third Circuit Court of Appeals and reverse with

instructions to rule expressly on the applicability of DeShaney to the school context.

Respectfully submitted,

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